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NO PLACE FOR SPEECH ZONES: HOW COLLEGES ENGAGE IN EXPRESSIVE GERRYMANDERING

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INTRODUCTION

In November 2016, Kevin Shaw circulated pocket Constitutions written in the Spanish language to his peers at Pierce College, a public institution in California.[1] Though he stood on a public sidewalk, an administrator told Shaw that if he did not move to a designated "free speech zone," he would be asked to leave campus.[2] The speech zone consisted of .003% of the entire campus, comparable to the area that an iPhone would take up on a tennis court.[3] Shortly thereafter, Shaw filed a lawsuit challenging the zone

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1. *Student Sues Los Angeles Community College District to Free Over 150,000 Students from Unconstitutional 'Free Speech Zones*,*'* FIRE (Mar. 28, 2017), https://www.thefire.org/student-sues-los-angeles-community-college-district-to-free-over-150000-students-from-unconstitutional-free-speech-zones/ [https://perma.cc/PQ45-QF3B] [hereinafter *Student Sues Los Angeles Community College*].

2. *Pierce College Student Alleges Constitution Not Allowed to Be Distributed Outside 'Free Speech Zone*,*'* CBS L.A. (Mar. 30, 2017, 11:16 AM), http://losangeles.cbslocal.com/2017/03/30/pierce-college-student-alleges-constitution-not-allowed-to-be-distributed-outside-free-speech-zone/ [https://perma.cc/P8DF-YVUK] [hereinafter *Pierce College Student*].

3. *Id.* That same year, people were arrested at Kellogg Community College in Michigan for distributing pocket Constitutions because they also did not stand in a campus speech zone. Anthony L. Fisher, *Students Arrested for Passing Out Pocket Constitutions on Michigan Community College Campus Sue School*, REASON (Jan. 21, 2017, 7:30 AM), http://reason.com/blog/2017/01/21/students-arrested-constitutions-michigan [https://perma.cc/S5GH-6CLW]. It appears that some of the distributors were students, but only non-students were arrested for trespass. John Agar, *Kellogg Community College Rejects Conservative Youth Group's Speech Complaint*, MLIVE MEDIA GROUP, (June 22, 2017), http://www.mlive.com/news/grand-rapids/index.ssf/2017/06/kellogg_community_college_disp.html [https://perma.cc/ZS56-BMW5]. The university dropped the trespass charges, but the members of the

as an unconstitutional restriction on his First Amendment rights, joining many students who have brought similar actions in the past fifty years.[4]

Although the right to speak freely is one of America's most valued constitutional provisions, courts have never interpreted the Constitution to guarantee an absolute freedom to speak.[5] Restrictions on speech can occur if they are narrowly limited to certain categories of speech or if they regulate the time, place, or manner of speech.[6] In addition to permitting limitations on types of speech, courts have developed precedent that emphasizes the forum—namely, the "public place . . . devoted to assembly or debate"—in which speech occurs.[7]

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group sued the college for a violation of their First Amendment rights. *Id.*

4. *Pierce College Student*, *supra* note 2; *Student Sues Los Angeles Community College*, *supra* note 1; *Million Voices Campaign*, FIRE, http://www.standupforspeech.com/million-voices-campaign/ [https://perma.cc/JFN7-CUS5] (last visited Oct 16, 2018).

5. *See, e.g.*, FLOYD ABRAMS, THE SOUL OF THE FIRST AMENDMENT 11–13 (2017) (writing that although "[t]he imposition of strict limits on governmental authority over religion, speech, and press was the central purpose of the First Amendment," judicial precedent demonstrates that it is not an absolute freedom; instead, many jurists favor balancing speech "against the democratic needs of civility and morality").

6. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. Following *Chaplinsky*, the Supreme Court held that the guarantees of the First Amendment "do not permit a [s]tate to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); *see also* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (relying on case precedent to determine that "[e]xpression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions").

7. Derek P. Langhauser, *Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity*, 31 J.C. & U.L. 481, 495–96 (2005) ("The origin of forum analysis dates back to 1897 when the United States Supreme Court held broadly that the government was free to control its property as it saw fit."); *Forum*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992) ("[I]t is . . . well settled that the government need not permit all forms of speech on property that it owns and controls."); *Public Forum*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining a public forum as "[a] public place where people traditionally gather to express ideas and exchange views"). Legal recognition of designated public debate areas dates back to London's Hyde Park. John J.

Sometimes, one locale acts as a host for many forums; this is particularly evident on college campuses.[8] For instance, a single college campus may contain traditional public forums, designated public forums, and nonpublic forums, which are characterized by the school's intended use for each space.[9]

Courts have historically viewed American universities as the "quintessential 'marketplace of ideas,'"[10] "where the free and unfettered interplay of competing views is essential to the institution's educational mission."[11] Despite this generally accepted view of the university's role, the First Amendment has proven a controversial subject in the educational realm.[12] In seemingly predictable cycles dating at least to the 1960s, universities enact restrictive speech policies, triggering a backlash by students, faculty, and free speech advocates from both the political right and left.[13]

Brogan, *Speak & Space: How the Internet Is Going to Kill the First Amendment as We Know It*, 8 VA. J.L. & TECH. 8, 16 (2003). In the mid-nineteenth century, audiences visited the park to engage in political speech; when police attempted to intervene and stop the speech, the government faced severe backlash from English citizens. *History of Speakers' Corner*, THE ROYAL PARKS, https://www.royalparks.org.uk/parks/hyde-park/things-to-see-and-do/speakers-corner [https://perma.cc/M992-SH5M]. Thus, the government dedicated a portion of Hyde Park—which became known as the Speakers' Corner—as a location in which public debate could occur. *Id.*

8. *See, e.g.*, Bloedorn v. Grube, 631 F.3d 1218, 1232 (11th Cir. 2011).

9. *See infra* Part I.

10. Thomas J. Davis, *Assessing Constitutional Challenges to University Free Speech Zones Under Public Forum Doctrine*, 79 IND. L.J. 267, 275 (2004) (citing Healy v. James, 408 U.S. 169, 180 (1972)).

11. Coll. Republicans at S.F. State Univ. v. Reed, 523 F. Supp. 2d 1005, 1016 (N.D. Cal. 2007) (quoting Doe v. Univ. of Mich., 721 F. Supp. 852, 863 (E.D. Mich. 1989) (citing Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967))); *see also* JOHN STUART MILL, ON LIBERTY 86–120 (David Bromwich & George Kaleb, eds., Yale Univ. Press 2003). Mill's essay is well-known for its assertion of individual rights, particularly freedom of speech. *Id.* at 86–87; *see also* Owen Fiss, *A Freedom Both Personal and Political*, *in* ON LIBERTY 179–95 (David Bromwich & George Kaleb eds., Yale Univ. Press 2003). Mill argues that silence is an "evil" that "[robs] the human race" of its own truth-seeking capabilities, and he asserts that no one has the authority to command others to accept or deny an asserted truth. MILL, *supra* at 87.

12. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969); Abbott v. Pastides, 900 F.3d 160 (4th Cir. 2018); Roberts v. Haragan, 346 F. Supp. 2d 853, 856 (N.D. Tex. 2004); Students Against Apartheid Coal. v. O'Neil, 660 F. Supp. 333, 333–37 (W.D. Va. 1987).

13. Michael Traynor, *Citizenship in a Time of Repression*, 2005 WIS. L. REV. 1, 16–17 (2005). The ebb and flow of advocacy for free speech transcends ideological views and is led by different groups at different times. *Id.* "Loyalty oaths" against Communism required of university professors, combined with the Vietnam War draft, caused both liberal and conservative students to fear censorship in the 1950s and 1960s, prompting them to push back against school speech restrictions. *Id.* The "civility codes" against hate speech during the 1980s and '90s were praised by liberals but met with outcry from

Currently, our nation is facing changing tides on campuses once again, with both sides of the political spectrum asserting their freedom of expression.[14]

One of the most controversial policies is universities' establishments of free speech zones.[15] Free speech zones are locations on campus where schools limit permitted student expression, ranging from disruptive protests to silent leafleting.[16] Though school administrators claim that the purpose of these zones is

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conservatives. Carolyn M. Mitchell, *The Political Correctness Doctrine: Redefining Speech on College Campuses*, 13 WHITTIER L. REV. 805, 805–06 (1992); Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split over College Students' First Amendment Rights*, 14 TEX. J. ON C.L. & C.R. 27, 28 (2008). In contrast, the early 2000s saw a period of resistance, primarily led by liberals, against Republican-initiated security measures such as the PATRIOT Act. Traynor, *supra*, at 17–18, 27–29; *see also* Arthur R. Miller, *Privacy: Is There Any Left?*, 3 FED. CTS. L. REV. 87, 101 (2009) ("[A] lot of people are concerned about the implications for our civil liberties of today's massive data collection, especially after 9/11 and the enactment of the PATRIOT Act."); Nida Siddiqui, *N ∑ National Security Frat Party: Government Surveillance on College Campuses*, 9 NE. U. L. REV. 453, 469–71 (2017) (writing that the PATRIOT Act granted the government broad authority to access student records without their consent).

14. *Arguments over Free Speech on Campus Are Not Left v. Right*, ECONOMIST (Sept. 7, 2017), https://www.economist.com/news/united-states/21728688-reed-college-oregon-shows-left-v-left-clashes-can-be-equally-vitriolic-arguments [https://perma.cc/F4WH-2KN8]; Collin Binkley, *College Campus Free-Speech Zones Face New Scrutiny, Lawsuit*, U.S. NEWS & WORLD REP. (Mar. 28, 2017, 8:46 PM), https://www.usnews.com/news/us/articles/2017-03-28/campus-free-speech-zones-face-new-round-of-scrutiny [https://perma.cc/9DCM-276P]; Maria Danilova & Jocelyn Gecker, *Colleges Grappling with Balancing Free Speech*, *Campus Safety*, MERCURY NEWS (Aug. 19, 2017), http://www.mercurynews.com/2017/08/19/colleges-grappling-with-balancing-free-speech-campus-safety/ [https://perma.cc/UTS6-V5E5]. Groups like the American Civil Liberties Union (ACLU), a traditionally left-leaning entity, and the Foundation for Individual Rights in Education (FIRE), widely recognized as a right-wing nonprofit, are simultaneously leading efforts to combat speech codes at universities. *See, e.g.*, Jim Sleeper, *The Conservatives Behind the Campus 'Free Speech' Crusade*, AMERICAN PROSPECT (Oct. 19, 2016), http://prospect.org/article/conservatives-behind-campus-%E2%80%98free-speech%E2%80%99-crusade [https://perma.cc/BZ6H-LR7Z]; David E. Weisberg, *ACLU Proves Yet Again It's a Guardian of Left-Wing Agenda*, HILL (Aug. 21, 2017, 2:20 PM), http://thehill.com/blogs/pundits-blog/civil-rights/347375-aclu-proves-yet-again-its-a-guardian-of-left-wing-movement [https://perma.cc/C2XH-8CSE]. Interestingly, the ACLU even defended the "Unite the Right" protest that occurred in Charlottesville in 2017, pointing out that "racism and bigotry will not be eradicated if we merely force them underground." Joan Biskupic, *ACLU Takes Heat for Its Free-Speech Defense of White Supremacist Group*, CNN (Aug. 17, 2017, 5:28 AM), http://www.cnn.com/2017/08/16/politics/aclu-free-speech-white-supremacy/index.html [https://perma.cc/S7SR-EEWT].

15. Carol L. Zeiner, *Zoned Out! Examining Campus Speech Zones*, 66 LA. L. REV. 1, 14 (2005).

16. Davis, *supra* note 10, at 267–68; *see also* George Leef, *College Officials Tell Students: You May Speak Freely As Long As It's Within Our (Tiny) Speech Zone*, FORBES (Dec. 15, 2016, 9:00 AM), https://www.forbes.com/sites/georgeleef/2016/12/15/college-officials-tell-students-you-may-speak-freely-as-long-as-its-within-our-tiny-speech-zone/#675f354875cd [https://perma.cc/L6T5-L4ZD].

to maintain a peaceful learning environment,[17] critics argue that the areas violate First Amendment rights and warn against the "Orwellian" risks of limiting speech to certain locations.[18] Many litigants have challenged the zones, particularly in the past twenty years, as violations of the First Amendment.[19] Given the existing model of free speech analysis, where courts consider whether restrictions are acceptable as to time, place, and manner, free speech litigation typically depends on the location in which the speech occurs.[20] This has led to highly varied results in such litigation despite similarities between claims.[21]

Changing social issues led students to assert their First Amendment rights in the twentieth century;[22] simultaneously, voters started denouncing discrimination by fighting racial and partisan gerrymandering.[23] The term gerrymandering refers to the division of geographical areas into units to favor a certain group, often with the purpose of influencing an election.[24] Recently, cases such as *Vieth v. Jubelirer* and *Gill v. Whitford* have turned the Supreme Court of the

17. *See* Joseph D. Herrold, *Capturing the Dialogue: Free Speech Zones and the "Caging" of First Amendment Rights*, 54 DRAKE L. REV. 949, 955–56 (2006). Herrold suggests that universities may prefer to keep speech "out of the public eye" to prevent controversy or a particular message from being associated with the university. *Id.*

18. Ronald Bailey, *Speakers Cornered*, REASON (Feb. 5, 2004), http://reason.com/archives/2004/02/05/speakers-cornered [https://perma.cc/2XUG-SV7H]; *accord* George Leef, *Shouldn't an Entire Campus Be a Free Speech Zone—Not Just .02 Percent of It?*, JAMES G. MARTIN CTR. FOR ACAD. RENEWAL (Jan. 13, 2017), https://www.jamesgmartin.center/2017/01/shouldnt-entire-campus-free-speech-zone-not-just-02-percent/ [https://perma.cc/H7BU-YUD2].

19. *See infra* Part I.

20. *See, e.g.*, Bayless v. Martine, 430 F.2d 873, 878 (5th Cir. 1970) (finding a campus speech zone was a reasonable restriction based on the location in which speech occurred).

21. *See* Herrold, *supra* note 17, at 956–58.

22. Zeiner, *supra* note 15, at 12.

23. Baker v. Carr, 369 U.S. 186, 187–93 (1962); Stephen Wolf, *Race Ipsa: Vote Dilution, Racial Gerrymandering, and the Presumption of Racial Discrimination*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 225, 243–44 (1997). "The country experienced a major shift in the 1940s–1960s as civic nationalism gained ascendancy and figured prominently in the Civil Rights Movement, spelling the end for white racial nationalism." Jason Rathod, *A Post-Racial Voting Rights Act*, 13 BERKELEY J. AFR.-AM. L. & POL'Y 139, 142 (2011); *see also* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 596 (2002) (describing how partisan gerrymandering illustrates "the failure of constitutional law to ensure the competitive vitality of the political process").

24. *Gerrymandering*, BLACK'S LAW DICTIONARY (10th ed. 2014).

United States's attention to partisan gerrymandering, which is implemented to "pack" votes to a party's advantage or "crack" votes to a group's disadvantage.[25] Though the intricacies of establishing voter standing or determining a judicially manageable standard are not relevant to this note, the underlying First and Fourteenth Amendment implications of the *Vieth* and *Gill* cases are quite similar to the issues courts must consider when faced with campus speech zones.

This note takes a critical look at the shortcomings of the current tests applied to speech zone litigation as well as the constitutional violations that occur when public schools carve out speech areas. Part I examines the evolution of First Amendment law in education, with a focus on university free speech zones.[26] Part II analyzes the convoluted First Amendment jurisprudence, suggesting that the time, place, and manner test, typically used in conjunction with a forum analysis when examining the constitutionality of speech zones, allows universities to practice what is known as "expressive gerrymandering."[27] Finally, Part III proposes that courts eliminate the place prong of the time, place, and manner test altogether to simplify some of the complexities associated with free speech litigation on college campuses.[28]

I. Background

From the protest-driven 1960s, to the civility movement in the 1980s, followed by the fear of terrorism in the 2000s, university administrators have had to balance safety concerns with the right to speak.[29] Recent criticism suggests that universities are overstepping constitutional boundaries, particularly by using speech zones to

25. Gill v. Whitford, 138 S. Ct. 1916, 1920 (2018); Vieth v. Jubelirer, 541 U.S. 267, 289 (2004).

26. *See infra* Part I.

27. *See infra* Part II.

28. *See infra* Part III.

29. *See, e.g.*, Roberts v. Haragan, 346 F. Supp. 2d 853, 870 n.20 (N.D. Tex. 2004) ("Permission for activities near intersections or during certain hours in close proximity to academic buildings might also be justified by a significant [u]niversity interest in assuring safety or an environment conducive to study or teaching.").

determine when, where, and how students convey their messages.[30] Litigation against gerrymandering arose during the same years that students began challenging speech restrictions.[31] Because gerrymandering and freedom of speech have followed similar historical trajectories, courts are once again hearing complaints against university speech policies while they also attempt to resolve constitutional issues related to gerrymandering.[32]

A. The Rise of Free Speech on College Campuses

1. Peace, Protests, and "Parents" No More

The seemingly simple phrase, "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people to peaceably assemble" has given way to a variety of complex standards and guarantees in the last century.[33] Contrary to popular belief, courts do not always protect speech.[34] For instance, authorities may restrict speech that directly incites others to engage in violence or "imminent lawless action" in order to serve a substantial government interest in safety.[35]

Dissenters began asserting their right to speak in the twentieth century when the government attempted to suppress new political ideologies during wartime.[36] For instance, courts frequently upheld state and local government restrictions when speech merely advocated violence.[37] Ultimately, the Supreme Court overturned this

30. *See Student Sues Los Angeles Community College*, *supra* note 1.

31. Baker v. Carr, 369 U.S. 186, 187–93 (1962).

32. *See, e.g.*, Speech First, Inc. v. Schlissel, No. CV 18-11451, 2018 WL 3722809, at *1 (E.D. Mich. Aug. 6, 2018); *see also* Gill v. Whitford, 138 S. Ct. 1916, 1920 (2018).

33. U.S. CONST. amend. I. *See generally* WILLIAM J. RICH, 1 MODERN CONSTITUTIONAL LAW § 5:1 (3d ed. 2017).

34. *See, e.g.*, Schenck v. United States, 249 U.S. 47, 52 (1919).

35. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

36. RICH, *supra* note 33. With war came new ideas that caused citizens to fear communism, fascism, and other potentially controversial movements. *Id.*

37. *See, e.g.*, Debs v. United States, 249 U.S. 211, 216 (1919) (finding that the "natural tendency and reasonably probable effect" of an anti-war speech was to impede recruitment to the United States military in violation of the Espionage Act); *see also* Whitney v. California, 274 U.S. 357, 371 (1927), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969) (upholding state statute that

standard, establishing the rule that government entities could only outlaw speech that was likely to produce imminent lawless action.[38] During this time, complaints against government restrictions on free speech naturally found their way into the university setting.[39]

Traditionally, schools acted *in loco parentis*, meaning that universities had "the power to discipline, control, and regulate their students to a high degree; they also enjoyed considerable immunity from liability and insularity from judicial review."[40] Students' First Amendment rights were considerably curtailed, and students rarely brought lawsuits against universities.[41] However, the turbulent climate of the late 1960s became a catalyst for the development of modern First Amendment law in the educational field.[42] During that decade, students became heavily involved in political and social issues, including the civil rights movement, the sexual revolution, and the Vietnam War.[43] Although their protests were often peaceful, some of them grew riotous.[44] The Kent State University killings offer perhaps the most drastic example, and many scholars consider the

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made it a crime "to knowingly be or become a member of or assist in organizing an association to advocate, teach[,] or aid and abet the commission of crimes or unlawful acts of force, violence[,] or terrorism as a means of accomplishing industrial or political changes").

38. *Brandenburg*, 395 U.S. 444, 447, 449 (1969). The Court held in *Brandenburg*:

> [T]he constitutional guarantees of free speech and free press do not permit a [s]tate to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.
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> . . . .
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> . . . The contrary teaching of Whitney v. California, supra, cannot be supported, and that decision is therefore overruled.

Id.

39. Zeiner, *supra* note 15, at 12–13; *see also* Herrold, *supra* note 17, at 956.

40. Zeiner, *supra* note 15, at 12–13.

41. *Id.* at 13.

42. *Id.*; *The Free Speech Movement: Overview*, CALISPHERE, https://calisphere.org/exhibitions/43/the-free-speech-movement/#overview [https://perma.cc/TJD4-ZWZ2] (last visited Oct. 16, 2018).

43. *The Student Movement of the 1960s*, STUDY.COM, http://study.com/academy/lesson/the-student-movement-of-the-1960s.html [https://perma.cc/554P-VLV9] (last visited Oct. 16, 2018) (describing how opposition to racism on college campuses in the south evolved into broader movements toward "liberation" from the "conformist culture of the 1950s").

44. Michael J. Hampson, *Protesting the President: Free Speech Zones and the First Amendment*, 58 RUTGERS L. REV. 245, 251 (2005) (writing that protestors conducted peaceful protests by expressing "their political discontent through bus boycotts, freedom rides, sit-ins, and public meetings").

subsequent Supreme Court case as a turning point in educational law.[45]

In 1970, hundreds of students assembled at Kent State to protest the Vietnam War.[46] Though initially peaceful, the gathering turned violent and destructive in the days that followed.[47] When the Ohio National Guard attempted to disperse the protest from the University Commons, members of the Guard suddenly fired into the crowd, killing four students and injuring nine.[48] The students sued the university president for damages and various civil rights claims.[49] The district court dismissed the claims for lack of jurisdiction, as was typical for student lawsuits at the time.[50] However, the Supreme Court reversed the lower court and essentially rejected the immunity traditionally granted to universities, holding that students may sue colleges for civil rights violations.[51]

This holding was a notable departure from the traditional *in loco parentis* doctrine that had previously granted schools wide discretion and immunity.[52] These new protections for students even applied to minors.[53] *Tinker v. Des Moines Independent School District* was a landmark case that upheld students' free speech rights when middle and high schoolers were punished for wearing black armbands to protest the Vietnam War.[54] The Supreme Court noted that the school had "an urgent wish to avoid the controversy [that] might result from . . . opposition to this [n]ation's part in the conflagration in

45. Zeiner, *supra* note 15, at 13–14, 61 n.55 (2005) ("Four student protestors who presented no threat of deadly force were shot and killed by Ohio National Guardsmen at Kent State University on May 4, 1970.").

46. *Kent State Shooting*, HISTORY, http://www.history.com/topics/kent-state-shooting [https://perma.cc/9KLB-M4U6] (last visited Oct. 16, 2018).

47. *Id.*

48. *Id.*

49. Scheuer v. Rhodes, 416 U.S. 232, 232 (1974).

50. *Id.*

51. *See generally id.* at 232–50.

52. *Id.* at 238.

53. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).

54. *Id.* at 504.

Vietnam," but the risk of disturbance in the classroom is a risk the Constitution "says we must take."[55]

The Court further held that, in order to justify a restriction on speech, a school must demonstrate that the speech would "materially and substantially interfere with . . . the operation of the school."[56] Most notably, the Court carved out an exception that has bolstered school-imposed speech restrictions and has become a major source of case precedent: the time, place, and manner test.[57] The test's general proposition is that "the state may . . . enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[58]

During this decade, schools also began taking measures to promote a learning environment that was not disruptive by establishing areas

55. *Id.* at 508, 510. Although it should be noted that *Tinker* is not directly controlling here because the First Amendment applies differently in postsecondary institutions, the case at least illustrates the most basic free speech protections that extend to college students. In other words, college students likely possess even greater protection than what the Court describes in *Tinker*. *See, e.g.*, Coll. Republicans at S.F. State Univ. v. Reed, 523 F. Supp. 2d 1005, 1015 (N.D. Cal. 2007).

> [I]n some circumstances secondary schools may regulate speech or expressive conduct that otherwise would be protected . . . .
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> . . . [T]he courts have given weight to the mandatory nature of primary and secondary education, the fact that students in these environments typically are minors, and the "custodial and tutelary" responsibilities the schools must shoulder for the children.
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> . . . [T]he state does not require higher education and has much less interest in regulating it, the students in colleges and universities are not children, but emancipated (by law) adults, and, critically, the mission of institutions of higher learning is quite different from the mission of primary and secondary schools.

Id. at 1015.

56. *Tinker*, 393 U.S. at 509.

57. *Id.* at 513 (stating that student conduct "which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech"); *see also* Healy v. James, 408 U.S. 169, 192–93 (1972) (finding that "reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related . . . activities must be respected").

58. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); *see also Narrowly Tailored*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining the term as "being only as broad as is reasonably necessary to promote a substantial governmental interest that would be achieved less effectively without the restriction; no broader than absolutely necessary").

for student expression.[59] The first lawsuit involving a college free speech zone was *Bayless v. Martine*, occurring just one month after the Kent State shooting and one year after *Tinker*.[60] In this case, students challenged the university's refusal to allow them to protest in an area "located between two classroom buildings" because it would disrupt classes and block the flow of traffic.[61] The Fifth Circuit Court of Appeals struck down the students' challenge, applying the new time, place, and manner test.[62] The court found that a university's nondiscriminatory security interests outweighed students' desire to speak in a certain location.[63] As speech litigation became more common at universities, the Supreme Court created protections for symbolic speech and protests, and struck down restrictions based on the viewpoints of the speaker.[64] At the same time, however, it deferred to speech restrictions on government property—namely, college campuses—when the property was not "a traditional locus of free speech activity."[65]

2. Hate Speech, Terror, and the Rise of Speech Zone Litigation

The late 1980s and early 1990s saw another period of unrest on campuses with the emergence of school policies against hate speech.[66] Furthermore, largely in response to the September 11th

59. Herrold, *supra* note 17, at 950; Traynor, *supra* note 13, at 17–18.

60. David S. Allen, *Spatial Frameworks and the Management of Dissent: From Parks to Free Speech Zones*, 16 COMM. L. & POL'Y 383, 415 (2011).

61. Bayless v. Martine, 430 F.2d 873, 875 (5th Cir. 1970).

62. *Id.* at 878. The court considered it "admirable" that university administrators went "the extra mile" to offer alternative locations for the speakers. *Id.*

63. *Id.* at 878–79.

64. RICH, *supra* note 33.

65. *Id.*

66. Zeiner, *supra* note 15, at 22–23. The rise of hate speech codes accompanied an "epidemic" of hate crimes across the nation in the early 1990s. Mitchell, *supra* note 13, at 815–16; *see also Speech*, BLACK'S LAW DICTIONARY (10th ed. 2014) (adding a definition for hate speech in 1988 and defining it as "speech that carries no meaning other than the expression of hatred for some group, such as a particular race, esp. in circumstances in which the communication is likely to provoke violence"). Though there was little controversy about campus speech zones during that decade, universities currently employ the same justifications for speech zones as they did for speech codes in the 1990s: namely, that a university has a duty and objective to "foster a culture of respect, inclusion, and civility." Janet Napolitano, *"Only Yes Means Yes": An Essay on University Policies Regarding Sexual Violence*

terrorist attacks, designated free speech areas resurfaced at universities in the early 2000s.[67] Politically-liberal students and scholars considered this an oppressive measure by the George W. Bush administration.[68] However, lawsuits during that time suggested that students on all sides of the political spectrum took issue with the speech zones.[69]

Many of the lawsuits in the early 2000s involved disciplining students who engaged in disruptive speech outside of the designated areas.[70] In one instance, police arrested a student for stepping outside of a California community college's speech zone.[71] At West Virginia University, police intervened when students attempted to hold signs and distribute anti-Disney flyers outside of a speech zone.[72] After the Foundation for Individual Rights in Education (FIRE) intervened, the university agreed to meet with students and ultimately revised its policy to be more speech-friendly.[73] In another case, a student wanted to speak against homosexuality in a location near the Texas Tech campus, but the university sent him to its free speech gazebo instead.[74] An administrator then admitted that the student's "personal belief" did not benefit the "entire [u]niversity community," and thus,

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and Sexual Assault, 33 YALE L. & POL'Y REV. 387, 389 (2015); *accord* Zeiner, *supra* note 15, at 18–21.

67. Herrold, *supra* note 17, at 954.

68. AMERICAN CIVIL LIBERTIES UNION, FREEDOM UNDER FIRE: DISSENT IN POST-9/11 AMERICA 11 (2003).

A favorite tactic of the Bush administration has been to herd protesters at presidential appearances into "designated protest zones" . . . . The policy, applied only to those with dissenting views, has been used to suppress dissent nationwide, and ACLU lawyers around the country are working to get charges dropped against people arrested for nothing more than wanting to voice their opinion during a presidential visit.

Id.; *see also* Traynor, *supra* note 13, at 3–7.

69. Zeiner, *supra* note 15, at 1.

70. *Id.*

71. *Id.*

72. Davis, *supra* note 10, at 267, 296.

73. Michael A. Fuoco, *Students Protest WVU Free Speech Zones*, (Feb. 13, 2002), http://old.post-gazette.com/regionstate/20020213freespeech0213p4.asp [https://perma.cc/F6QF-QAHL]; Mary Kershaw, *WVU Students are at Greater Liberty to Protest*, FIRE (May 12, 2002) https://www.thefire.org/media-coverage/wvu-students-are-at-greater-liberty-to-protest/ [https://perma.cc/DRD7-U66D].

74. Roberts v. Haragan, 346 F. Supp. 2d 853, 856 (N.D. Tex. 2004).

did not deserve a more convenient location.[75] The district court struck this down as content-based discrimination, but it warned that even if the regulation was content-neutral, the school failed to show:

> [H]ow its interests in controlling[,] harassing[,] or insulting student speech [were] significant enough to justify trespass on students' First Amendment freedom . . . . Students . . . rightly expect to have open to them public forums where their freedom of expression is not unnecessarily discounted in relation to governmental concerns.[76]

Whereas some courts struck down speech zones as overbroad because the zones were likely to discriminate against speakers, even if they were neutral as to speakers' viewpoints, others upheld the zones as "reasonable and viewpoint neutral" even if they were "rather narrow and limiting."[77] Many of these decisions turned on the forum in which the speech occurred.[78] A public forum is a location open to all members of the public for expression, whereas a nonpublic forum refers to a space that is reserved for private use.[79] A public forum can be traditional, meaning it has always been available to the public, or it can be designated, meaning the government has taken an affirmative step toward recognizing the public nature of the forum.[80] Courts have begun to recognize a third type of public forum known as the limited public forum.[81] The government creates a limited public forum when it "intentionally opens a facility"[82] or reserves

75. *Id.* at 856–57.

76. *Id.* at 872.

77. *Id.* at 871–73; *see also* Ala. Student Party v. Student Gov't Ass'n of the Univ. of Ala., 867 F.2d 1344, 1347 (11th Cir. 1989); Herrold, *supra* note 17, at 957–59.

78. Herrold, *supra* note 17, at 958.

79. Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018); Davis, *supra* note 10, at 270.

80. Davis, *supra* note 10, at 270. "To determine if a designated forum exists, a court 'look[s] to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum.'" *Id.* (citing Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985)).

81. *See, e.g.*, *Ala. Student Party*, 867 F.2d at 1350, 1353.

82. Susan McDermott, *Single-Sex Education and the First Amendment: Sex-Based Exclusion from Public School on the Basis of Time, Place, or Manner Restrictions*, 12 WIS. WOMEN'S L.J. 207, 238

property "for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects."[83] The standard applied to limited public forums ultimately depends on how a university treats the space.[84] If the reserved facility is open to the public, it is treated as a public forum.[85] If it is closed to the general public, it is treated as a nonpublic forum.[86]

3. Speech Zones and "Snowflakes": Campus Tension Mounting

Students are once again filing complaints against campus speech policies with similar results to the cases from the early 2000s. In 2011, the Eleventh Circuit Court of Appeals struck down a challenge to Georgia Southern University's free speech zone, an outdoor area located near the student center.[87] The court found that the zone was narrowly tailored to serve a compelling government interest, thus passing the time, place, and manner test.[88] The following year, in contrast, a district court in Ohio held that the University of Cincinnati's free speech zone, "less than one tenth the size of a football field," was unconstitutional because the restriction on speech implemented through the zone was overbroad and not narrowly

(1997).

83. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46, n. 7 (1983). In these forums, "'the class of speakers for whose especial benefit the forum was created'" may exclude others from assembling there. Bloedorn v. Grube, 631 F.3d 1218, 1237–39 (11th Cir. 2011) (citing *Cornelius*, 473 U.S. at 806).

84. McDermott, *supra* note 82.

85. *Id.* at 238–240.

86. *See id.*

87. *Bloedorn*, 631 F.3d at 1237–39.

88. *Id.* Though the plaintiff was a member of the public, rather than a student, this decision indicates that the Eleventh Circuit will likely uphold school speech areas in the future, regardless of who the speaker is, provided that the zones meet the relevant constitutional standards. *Id.* Similarly, a University of South Carolina student brought a lawsuit against his school in 2016, claiming that requiring advanced registration and a fee for a free speech event on campus created "a de facto speech zone." Abbott v. Pastides, 263 F. Supp. 3d 565, 572 (D.S.C. 2017), *aff'd*, 900 F.3d 160 (4th Cir. 2018). The court held that the speech zone issue was moot because the school amended its registration policy, but it upheld the school's decision that certain advertisements were too controversial to display on campus, demonstrating a somewhat deferential attitude toward the college. *Id.* at 579-82.

tailored to serve a compelling government interest.[89] Similarly, Kevin Shaw's lawsuit against Pierce College regarding the school's designated speech zone, "which measures 616 square feet[,] or about the size of three parking spaces," was recently resolved.[90] A federal district court in California ruled that Pierce College's restrictions were far too broad given the small portion of space available for student speech and the lack of any alternative spaces for student expression.[91] Even the Department of Justice has joined the attack on university speech codes.[92]

Furthermore, at least nine states have recently enacted legislation to abolish free speech zones, and more states may follow.[93] Most of the legislation is based on models created by FIRE and the Goldwater Institute.[94] Each bill employs the same or similar language that no public college or university can discriminate against student speech based on content, while still allowing colleges to restrict the time, place, or manner of speech.[95]

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89. Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams, No. 1:12-CV-155, 2012 WL 2160969, at *1, *6–7 (S.D. Ohio June 12, 2012).

90. Shaw v. Burke, No. 217CV02386ODWPLAX, 2018 WL 459661, at *9 (C.D. Cal. Jan. 17, 2018) (finding that although the university had a significant interest in avoiding disruption, the small size of its speech zone unnecessarily burdened student expression); Perry Chiaramonte, *LA College Sued by Student for Allegedly Curbing his Free Speech Rights*, FOX NEWS (Mar. 29, 2017), http://www.foxnews.com/us/2017/03/29/la-college-sued-by-student-for-allegedly-curbing-his-free-speech-rights.html [https://perma.cc/738D-VT9Q].

91. *Shaw*, 2018 WL 459661, at *9.

92. *See* Speech First, Inc. v. Schlissel, No. CV 18-11451, 2018 WL 3722809, at *1 (E.D. Mich. Aug. 6, 2018) (submitting a statement of interest in a case involving a college's anti-harassment policy and investigation procedures for bias incidents); *see also* David Jesse, *DOJ: Free Speech Has Come Under Attack on Campuses*, GOVERNING (June 12, 2018), http://www.governing.com/topics/education/tns-university-michigan-doj.html [https://perma.cc/W8MJ-H44W].

93. Andrew Blake, *Florida Lawmakers Ban 'Free Speech Zones' on College Campuses*, WASH. TIMES (Mar. 6, 2018), https://www.washingtontimes.com/news/2018/mar/6/florida-lawmakers-ban-free-speech-zones-college-ca/ [https://perma.cc/4TYU-P3A5]; Sophie Quinton, *Charlottesville May Put the Brakes on Campus Free Speech Laws*, HUFFINGTON POST (Aug. 24, 2017, 10:36 AM), http://www.huffingtonpost.com/entry/charlottesville-may-put-the-brakes-on-campus-free-speech_us_599ee3b9e4b0cb7715bfd39c [https://perma.cc/YC45-9R5F]; Adam Sabes, *Georgia Becomes 9th State to Pass Free Speech Legislation*, CAMPUS REFORM (May 15, 2018, 9:56 AM), https://www.campusreform.org/?ID=10903 [https://perma.cc/M4DC-UEU5];

94. Robert Shibley, *Goldwater Institute Releases Model Campus Free Speech Legislation for States*, FIRE (Jan. 31, 2017), https://www.thefire.org/goldwater-institute-releases-model-campus-free-speech-legislation-for-states/ [https://perma.cc/MU3S-32LC].

95. *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-1865 (2017); COLO. REV. STAT. § 23-5-144 (2017); VA.

In the past few years, there has been a firestorm of speakers and opinion pieces lashing out against school speech policies, and tensions appear to be escalating on campus.[96] Some scholars point to the political correctness ideology and increased attentiveness to cultural and racial differences, as well as stricter punishment for sexual assault cases and enforcement of safe spaces, as elements that have contributed to an environment of stifled speech.[97] Many pundits

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CODE ANN. § 23.1-900.1 (2017); *see also* Quinton, *supra* note 93. The enactment of these statutes primarily arose from concerns about the "pattern" of "belligerent protests" at universities, particularly when speakers are invited to campus and then disinvited following student backlash. Samantha Raphelson, *States Consider Legislation to Protect Free Speech on Campus*, NPR (May 5, 2017, 6:29 PM), https://www.npr.org/2017/05/05/527092506/states-consider-legislation-to-protect-free-speech-on-campus [https://perma.cc/3FSG-NK5U].

96. Kashana Cauley, *When Conservatives Suppress Campus Speech*, N.Y. TIMES (Oct. 17, 2017), https://www.nytimes.com/2017/10/17/opinion/conservatives-campus-speech-wisconsin.html [https://perma.cc/63QU-9R85]; Elliot C. McLaughlin, *War on Campus*, CNN (May 1, 2017), http://www.cnn.com/2017/04/20/us/campus-free-speech-trnd/index.html [https://perma.cc/H3BZ-H83Q].

97. *See, e.g.*, Roger Pilon, Vice President for Legal Affairs, Cato Institute, Address at Troy University: Academic Freedom and Free Speech, 1–4 (Mar. 16, 2016), https://object.cato.org/sites/cato.org/files/pubs/pdf/pilon-academic-freedom-speech.pdf [https://perma.cc/AE3T-YMQN]. In 2016, the administration at Bowdoin College punished students for attending a tequila-themed birthday party at which students wore small sombreros. *Id.* at 3; *see also* Koos Couvée, *Students Offered Counselling Over Small Sombrero Hats at Tequila-Themed Birthday Party*, INDEPENDENT (Mar. 6, 2016, 4:30 PM), http://www.independent.co.uk/news/world/americas/students-offered-counselling-over-small-sombrero-hats-at-tequila-themed-birthday-party-a6915521.html [https://perma.cc/VZ25-6QE8]. The college condemned the party as an "act of ethnic stereotyping" and even offered counseling to students offended by the incident. *Id.* In addition to removing party-goers from their dorms, the school's student government attempted to impeach two members who were present at the party, but it abandoned the proceedings when it became clear that it lacked the appropriate procedures in its bylaws, prompting threatened lawsuits by outside parties. Rachael Allen, *Articles of Impeachment for BSG Members Rescinded*, BOWDOIN ORIENT (Mar. 10, 2016), http://bowdoinorient.com/bonus/article/11046 [https://perma.cc/P6SX-S49Q]; Pilon, *supra* at 3. Many students, including those of Latin-American descent, viewed the college's response as excessive and unnecessarily restrictive. *See, e.g.*, Francisco Navarro, *The Ownership of Cultures Is Not a Simple Matter of Race and Ethnicity*, BOWDOIN ORIENT (Mar. 4, 2016), http://bowdoinorient.com/bonus/article/11018 [https://perma.cc/CV6F-YKXC] (writing "I spent the first fifteen years of my life living in Mexico . . . and I do not believe that the tequila party was an act of cultural misappropriation and deserving of punitive measures for the students involved"); *see also* Catherine Rampell, *Political Correctness Devours Yet Another College, Fighting over Mini-Sombreros*, WASH. POST (Mar. 3, 2016), https://www.washingtonpost.com/opinions/party-culture/2016/03/03/fdb46cc4-e185-11e5-9c36-e1902f6b6571_story.html?utm_term=.2695ae359ded [https://perma.cc/V8WX-6SL5] ("One student of Guatemalan and Costa Rican heritage . . . pronounced the whole kerfuffle 'mind-boggling' and called the disciplinary consequences a 'travesty,' especially in light of the dining hall's Mexican night a week later."). Additionally, in 2011, the Obama administration issued a letter that came to be known as the "Dear Colleague Letter," in which the Department of Education's Office of Civil Rights encouraged universities to investigate sexual harassment claims to

have even begun referring to millennials who are offended by speech as "Generation Snowflake."[98] On the other hand, several academics argue that curbing hate speech on campus is necessary to promote values like confidence, emotional stability, diversity, and "access to, full use of, and enjoyment of educational facilities and opportunities."[99]

The University of California, Berkeley, where the Free Speech Movement originated in the 1960s, has found itself in the spotlight once again as a site of newsworthy protests and counter-protests, particularly when controversial speakers come to campus.[100] Events

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prevent classrooms from becoming "a hostile environment." Dear Colleague Letter, U.S. Dep't of Educ. Office of C.R., 3–5 (Apr. 4, 2011) (archived by U.S. Dept. of Educ. Office of Civil Rights). Though it encouraged more immediate action against wrongdoers, the letter left many questions among university officials and legislators about whether this letter carried the force of law and whether the procedures suggested were constitutional. Jake New, *Must vs. Should*, INSIDE HIGHER ED (Feb. 25, 2016), https://www.insidehighered.com/news/2016/02/25/colleges-frustrated-lack-clarification-title-ix-guidance [https://perma.cc/6MKP-52FB]. Furthermore, critics of the letter claimed that it had a direct chilling effect on speech and inquiry on campus, as professors, particularly those who teach gender and sexuality, hesitate to discuss potentially offensive or triggering topics. *The History, Uses, and Abuses of Title IX*, 102 BULL. AM. ASS'N U. PROFESSORS 69, 88 (2016), https://www.aaup.org/file/TitleIXreport.pdf [https://perma.cc/5J6G-J3Q9]. However, the Trump administration recently rescinded the Letter. Robby Soave, *Breaking: Betsy DeVos Withdraws 'Dear Colleague' Letter That Weaponized Title IX Against Due Process*, REASON (Sept. 22, 2017, 12:14 PM), http://reason.com/blog/2017/09/22/breaking-betsy-devos-withdraws-dear-coll [https://perma.cc/F3AR-MA7K].

98. *See Snowflake Generation*, COLLINS ENGLISH DICTIONARY, https://www.collinsdictionary.com/dictionary/english/snowflake-generation [https://perma.cc/9FMK-NRBU] (last accessed Sept. 18, 2018) (defining the term as "the generation of people who became adults in the 2010s, viewed as being less resilient and more prone to taking offence than previous generations"). This reference is a nod to the novel-turned-movie, "Fight Club," where a line reads, "You are not special. You are not a beautiful and unique snowflake." Guy Birchall, *'I COINED SNOWFLAKE' Fight Club Writer Chuck Palahniuk Takes Credit For 'Generation Snowflake' Term And Says 'Whinging [sic] Left Needs to Stop Being so Offended'*, THE SUN (Jan. 24, 2017, 11:08 AM), https://www.thesun.co.uk/news/2700438/fight-club-writer-chuck-palahniuk-takes-credit-for-generation-snowflake-term-and-says-whinging-left-needs-to-stop-being-so-offended/ [https://perma.cc/9VU9-MCAW]. Critics accuse millennials around the world of feeling entitled to favorable treatment—including freedom from exposure to offensive language—and argue that it is not feasible to treat every individual as a "unique snowflake." Rebecca Nicholson, *'Poor Little Snowflake'—The Defining Insult of 2016*, GUARDIAN (Nov. 26, 2016, 10:02 AM), https://www.theguardian.com/science/2016/nov/28/snowflake-insult-disdain-young-people [https://perma.cc/WL5S-7G8X].

99. Zeiner, *supra* note 15, at 20.

100. *The Free Speech Movement: Overview*, *supra* note 42; *Berkeley Free Speech Protests: Arrests, Injuries, Damages since February*, FOX NEWS (Apr. 25, 2017), http://www.foxnews.com/politics/2017/04/25/berkeley-free-speech-protests-arrests-injuries-damages-

that took place in Charlottesville, Boston, and the city of Berkeley in the summer of 2017 turned the nation's attention to the free speech debate outside of the university environment.[101] As colleges prepared

since-february.html [https://perma.cc/3ZCS-C6CJ]. In one instance, protests broke out in response to controversial speaker Milo Yiannopoulos's scheduled speech in February 2017, causing $100,000 in damage. *Id.* In another instance, despite concern over conservative speaker Ben Shapiro's reputation, the university allowed him to speak in September 2017, promising enhanced security and "support services" for students and faculty "made to feel threatened or harassed" by his words. Riya Bhattacharjee, *'Snowflake Alert': Ben Shapiro Responds to UC Berkeley's Offer for Counseling to Students 'Impacted' by His Speech*, NBC (Sept. 8, 2017, 3:26 PM), http://www.nbcbayarea.com/news/local/UC-Berkeley-Offers-Security-Counceling-For-Those-Affected-by-Ben-Shapiro-Speech-443310293.html [https://perma.cc/YDR4-AQDS]. Police in riot gear arrested nine protesters during the event for "carrying banned weapons," and security for the day cost an estimated $600,000. Madison Park, *Ben Shapiro Spoke at Berkeley as Protesters Gathered Outside*, CNN (Sept. 15, 2017, 5:04 AM), http://www.cnn.com/2017/09/14/us/berkeley-ben-shapiro-speech/index.html [https://perma.cc/WQ83-XRRZ]; Elise Ulwelling, *Ben Shapiro's Visit Cost UC Berkeley an Estimated $600k for Security*, DAILY CALIFORNIAN (Sept. 17, 2017), http://www.dailycal.org/2017/09/17/uc-berkeley-security-costs-ben-shapiros-visit-estimated-600k/ [https://perma.cc/PEM4-YQQX]. Even small, private schools have undergone similar incidents; at Middlebury College, a professor suffered a concussion when students protesting a controversial speaker mobbed her car. Travis Andersen, *Middlebury College Punishes Students who Disrupted Charles Murray Talk*, BOS. GLOBE (April 29, 2017), https://www.bostonglobe.com/metro/2017/04/28/middlebury-college-lowers-boom-campus-protesters-who-disrupted-charles-murray-talk/ZDuJOxqvw1m2MsmQr4S0hO/story.html [https://perma.cc/XK7Y-HXP5]. Though the school punished as many as sixty-seven students, some argued that this was too lenient. Richard Cohen, *Protesters at Middlebury College Demonstrate 'Cultural Appropriation'—of Fascism*, WASH. POST (May 29, 2017), https://www.washingtonpost.com/opinions/protesters-at-middlebury-college-demonstrate-cultural-appropriation—of-fascism/2017/05/29/af2a3548-4241-11e7-9869-bac8b446820a_story.html?utm_term=.107d28264117 [https://perma.cc/X3LT-SCRS]; Stephanie Saul, *Dozens of Middlebury Students Are Disciplined for Charles Murray Protest*, N.Y. TIMES (May 24, 2017), https://www.nytimes.com/2017/05/24/us/middlebury-college-charles-murray-bell-curve.html [https://perma.cc/X88S-92QT]. Ironically, the professor did not even agree with the speaker's views. Andersen, *supra*.

101. Daniella Silva, *U.S. Cities Brace for Upcoming Right-Wing Rallies in Wake of Charlottesville,* NBC (Aug. 16, 2017, 2:02 PM), https://www.nbcnews.com/news/us-news/u-s-cities-brace-upcoming-right-wing-rallies-wake-charlottesville-n792956 [https://perma.cc/K9G6-AWP8]. In Charlottesville, members of the Ku Klux Klan assembled to protest what they called "the ongoing cultural genocide . . . of white Americans." Sarah Toy, *KKK Rally in Charlottesville Met with Throng of Protesters*, USA TODAY (July 9, 2017 10:26 AM), https://www.usatoday.com/story/news/nation-now/2017/07/08/kkk-holds-rally-virginia-and-met-protesters/462146001/ [https://perma.cc/EQ77-XXB5]. Counter-protesters arrived, and violence erupted. Ralph Ellis, *The KKK Rally in Charlottesville Was Outnumbered by Counterprotesters*, CNN (July 10, 2017 3:14 AM), http://www.cnn.com/2017/07/08/us/kkk-rally-charlottesville-statues/index.html [https://perma.cc/EQV6-4UBA]. Following the events in Charlottesville, the Boston Free Speech Coalition attempted to hold a Free Speech Rally. Meghan E. Irons, *Who Is the Boston Free Speech Coalition Behind Saturday's Rally?,* BOS. GLOBE (Aug. 16, 2017), https://www.bostonglobe.com/metro/2017/08/15/who-boston-free-speech-coalition-behind-saturday-rally/eRrE4qpFSBKC4pD8T1iHjI/story.html [https://perma.cc/TFN6-2Y2W]. The organizers of the event denounced white supremacy and attempted to distance themselves from the Charlottesville protests, but thousands of counter-protesters assembled, accused the speakers of alt-right views, and shut

for backlash and potentially harmful protests in the wake of these events, some may have been overzealous in their efforts to prevent instances of hatred and racism. For instance, at the University of Nebraska-Lincoln, university staff members, including professors, allegedly harassed a student leader who was promoting capitalism and limited government.[102] Though staff members accused the student of being a member of the Ku Klux Klan while directing "vulgar gestures" at her, the university's president simply classified the incident as a "missed opportunity" to promote civil discussion.[103]

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down the event. Meghan Barr, John Waller, & Dialynn Dwyer, *Here's What Happened at the 'Free Speech' Rally and Counter-Protests on Boston Common*, BOSTON (Aug. 20, 2017 7:15 PM), https://www.boston.com/news/local-news/2017/08/19/live-updates-free-speech-rally-counter-protests-boston-common [https://perma.cc/RJB6-3QQX]. The following week, a woman attempted to host a "No to Marxism in America" event in which she also clarified that white supremacists were unwelcome. Emilie Raguso, *'Anti-Marxist' Rally Organizer: Violence, White Supremacists Not Welcome*, BERKELEYSIDE (Aug. 24, 2017 4:57 PM), http://www.berkeleyside.com/2017/08/24/anti-marxist-rally-organizer-says-white-supremacists-violence-not-welcome-berkeley/ [https://perma.cc/U6RT-56ZR]. Even though she canceled the event after receiving violent threats, counter-protesters assembled in the park on the scheduled day, and violence ensued. Ron-Gong Lin II, *Berkeley Right-Wing Protest Organizer Explains Cancellation In Letter,* L.A. TIMES (Aug. 26, 2017, 2:02 AM), http://www.latimes.com/local/california/la-me-bay-area-protests-berkeley-right-wing-protest-organizer-1503738153-htmlstory.html [https://perma.cc/JX6M-FXZ8]; *Violence Breaks Out at Berkeley Rally Where Counter-Protesters Vastly Out Number Trump Supporters, L.A. TIMES* (Aug. 27, 2017, 11:21 AM), http://ktla.com/2017/08/27/after-peaceful-demonstration-in-san-francisco-second-counter-protest-expected-in-berkeley/ [https://perma.cc/NKG9-3WQR].

102. Rick Ruggles, *UNL Sophomore Says She Was Berated and Intimidated While Trying to Recruit Students for Conservative Group*, OMAHA WORLD HERALD (Aug. 30, 2017), http://www.omaha.com/news/education/unl-sophomore-says-she-was-berated-and-intimidated-while-trying/article_1187dc24-837c-51ad-9387-17f2ed7e6b5c.html [https://perma.cc/K6JE-UZPQ]; TURNING POINT USA, https://www.tpusa.com/ [https://perma.cc/UDL8-RGME]; *UNL President Responds to Free Speech Clash on Campus*, WOWT (Aug. 28, 2017 8:54 PM), http://www.wowt.com/content/news/UNL-President-responds-to-free-speech-clash-on-campus-442064643.html [https://perma.cc/5SH5-CLUP].

103. *UNL President Responds to Free Speech Clash on Campus*, *supra* note 102; *accord* Chris Dunker, *UNL Again Finds Itself in Midst of Free Speech Debate*, LINCOLN J. STAR (Aug. 30, 2017), http://journalstar.com/news/local/education/unl-again-finds-itself-in-midst-of-free-speech-debate/article_a9a3b96d-46f1-5009-8ebe-b6fbb56711a5.html [https://perma.cc/3EN3-JVQJ]. Three months later, two communications directors left the university due to fallout from the incident. Rick Ruggles, *Lecturer Accused of Harassing Conservative Student Will No Longer Work at UNL; 2 PR Officials Also Out, OMAHA WORLD HAROLD* (Nov. 19, 2017), https://www.omaha.com/news/education/lecturer-accused-of-harassing-conservative-student-will-no-longer-work/article_0a127208-cbfa-11e7-89dd-2b859c3ef2bd.html [https://perma.cc/ZC2R-AYER]. The UNL president also announced that a professor involved in the incident—who referred to the student as a "neo-fascist"—would remain at the school until her contract expired at the end of the academic year. *Id.* Finally, the president sent a letter to state officials recommitting the university to "open conversation." *Id.* These actions indicate that many groups (such as Conservative Review "and

B. The Simultaneous Rise of Complaints against Gerrymandering

The Civil Rights Movement of the mid-twentieth century went beyond students' rights; voters also asserted their rights during this time by filing complaints against gerrymandering.[104] The term *gerrymandering* is not exclusively used to describe voter redistricting; it can more generally refer to "dividing any geographical or jurisdictional area into political units . . . to give some group a special advantage."[105] *Baker v. Carr* was the first gerrymandering case to reach the Supreme Court, when voters challenged the Tennessee legislature's reapportionment plan.[106] The Court found that the issue was not an entirely political question and, therefore, it was justiciable.[107] Thus, lower courts could hear citizens' claims that gerrymandering violated the Equal Protection Clause of the Fourteenth Amendment because it produced an unconstitutional

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other organizations") were dissatisfied with the administration's initial response to the incident. *Id.*

104. Baker v. Carr, 369 U.S. 186, 187–93 (1962); Wolf, *supra* note 23; Rathod, *supra* note 23; *see also* Issacharoff, *supra* note 23.

105. *Gerrymandering*, *supra* note 24. The practice of gerrymandering "existed even before Congress did," though the term was officially coined after the governor of Massachusetts, Elbridge Gerry, redrew the state's voting districts to favor his own political party. Robert Draper, *The League of Dangerous Mapmakers*, ATLANTIC (Oct. 2012), https://www.theatlantic.com/magazine/archive/2012/10/the-league-of/309084/ [https://perma.cc/S8R5-U34E]. One district resembled a salamander in its shape, and "the term *gerrymander* has been used ever since to describe the contorting of districts." *Id.*

106. *Baker*, 369 U.S. at 187–88.

107. *Id.* at 209. When it comes to constitutional powers granted solely to the executive and legislative branches, "separation-of-powers principles have led to the conclusion that it is not the province or duty of the judiciary to say what the law is." RICHARD D. FREER & EDWARD H. COOPER, 13C FEDERAL PRACTICE AND PROCEDURE § 3534 (3d ed. 2017). As a result, courts consider political questions hesitantly and on an ad hoc basis. *Baker*, 369 U.S. at 211. The Supreme Court established some guidelines in *Baker* to assess a political question:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

"impairment of votes."[108] Twenty years later, in *Davis v. Bandemer*, the Court was unable to reach a consensus on what "judicially manageable standard" it should apply in partisan gerrymandering cases.[109] However, it expanded its equal protection jurisprudence, stating that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group's influence on the political process as a whole."[110]

Next, in *Vieth v. Jubelirer*, the Court held that partisan gerrymandering cases were nonjusticiable given their political nature.[111] A notable change occurred, however, when Justice Kennedy filed a concurring opinion.[112] In it, he introduced a First Amendment lens as a new way that a court might consider partisan gerrymandering cases.[113]

In 2018, Justice Kennedy had the opportunity to expand on this notion in *Gill v. Whitford*, a partisan gerrymandering case that reached the Supreme Court.[114] However, Justice Kennedy and his colleagues did not even reach the First Amendment argument because the Court unanimously decided that the plaintiffs in *Gill* lacked standing.[115] The Court did not, at any point, reject the gerrymandering claim altogether; rather, it remanded the case to the district court, and it seemed willing to entertain future gerrymandering claims so long as individual plaintiffs could demonstrate how they were personally affected by such schemes.[116]

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108. *Id.* at 207–08.
109. Davis v. Bandemer, 478 U.S. 109, 123 (1986).
110. *Id.* at 110.
111. Vieth v. Jubelirer, 541 U.S. 267, 267 (2004).
112. S*ee generally id.* at 306–16 (Kennedy, J., concurring).
113. *Id.* at 314–15.
114. *See generally* Gill v. Whitford, 138 S. Ct. 1916 (2018).
115. *Id.* at 1919.

116. *Id.* at 1933–34. Writing for the Court, Chief Justice Roberts stated:

> In cases where a plaintiff fails to demonstrate Article III standing, we usually direct the dismissal of the plaintiff's claims. This is not the usual case. It concerns an unsettled kind of claim this Court has not agreed upon, the contours

Instead of claiming a statewide injury through the gerrymandering plan, the plaintiffs should have focused on remedying the vote dilution that occurred within their own districts.[117] The Court seemed quite sympathetic to the burden placed on individual votes arising from placement in a packed or cracked district.[118]

As Justice Thomas noted in his concurring opinion, it was rather odd that the Court remanded *Gill*, rather than dismiss the case altogether, after finding a lack of standing.[119] This could indicate the Court's general willingness to hear a more particularized gerrymandering argument in the future. Furthermore, the record of oral arguments was replete with references to the First Amendment.[120] Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, advised the plaintiffs to clarify their First Amendment argument on remand, noting in her concurrence that this theory would be helpful to the injured voters.[121] It appears that Justice Kennedy may have won over support for his First Amendment theory among a majority of his colleagues. Although Justice Kennedy has since retired, there is still a possibility that his successors will adopt his dual approach to gerrymandering cases by combining First and Fourteenth Amendment analyses.[122]

> and justiciability of which are unresolved.
>
> We therefore remand the case to the District Court so that the plaintiffs may have an opportunity to prove concrete and particularized injuries using evidence—unlike the bulk of the evidence presented thus far—that would tend to demonstrate a burden on their individual votes.

Id. (internal citations omitted).

117. *Id.* at 1930.

118. *Id.* at 1931.

119. *Gill*, 138 S. Ct. at 1941.

120. *See generally* Transcript of Oral Argument, Gill v. Whitford, 138 S. Ct. 1916 (2018) (No. 16-1161).

121. *Gill*, 138 S. Ct. at 1934. Justice Kagan also noted that standing requirements are different for a First Amendment claim and could be asserted on a broader, statewide level. *Id.*

122. The Supreme Court heard two other gerrymandering cases during the same term. The first, *Benisek v. Lamone*, involved a similar claim by Republicans against a Democrat-initiated redistricting scheme in Maryland. Benisek v. Lamone, 138 S. Ct. 1942, 1943–44 (2018). The Court dismissed the case because the plaintiffs were unable to show irreparable harm from the scheme. *Id.* at 1944. The Court then remanded the case of *Rucho v. Common Cause*, ordering North Carolina courts to determine whether the plaintiff voters had standing in line with the *Gill* decision. Rucho v. Common Cause, 138 S.

II. Analysis

Despite hearing First Amendment claims against free speech areas for the past fifty years, courts have not come any closer to resolving the debate. The outcomes of these cases largely depend on the forum in which the zone was located.[123] The forum then controls the level of scrutiny with which courts assess the issue.[124] Therefore, a speaker's constitutional rights depend on where he chose to stand on a given day, and courts reach different outcomes because they must consider these competing layers of analysis.[125]

A. The Time, Place, or Manner Test in the Context of Forum and Scrutiny Analyses

1. Types of Forums

As First Amendment jurisprudence developed in schools, courts began examining the forums in which speech occurred on campus.[126] To determine what sort of forum is on a college campus, courts have developed an analysis examining "the traditional use of the property, the objective use and purposes of the space, the government intent

Ct. 2679, 2679 (2018). Notably, both cases addressed voters' First Amendment rights. *See* Common Cause v. Rucho, 318 F. Supp. 3d 777, 927 (M.D.N.C. 2018) ("As at least five Justices already have determined, we conclude that the First Amendment does not draw such fine lines" between government-imposed restrictions that burden speakers and government-imposed restrictions that burden voters.). *See generally* Transcript of Oral Argument, Benisek v. Lamone, 138 S. Ct. 1942 (2018) (No. 17-333).

123. *Compare, e.g.*, Bloedorn v. Grube, 631 F.3d 1218, 1232 (11th Cir. 2011) (finding that a university was not a traditional public forum, and, therefore, its free speech zone was a permissible time, place, and manner restriction in a designated public forum, while also finding that the university's sidewalks and centrally-located rotunda were limited public forums that justified reasonable speech restrictions without narrow tailoring), *with* Students Against Apartheid Coal. v. O'Neil, 660 F. Supp. 333, 338, 340 (W.D. Va. 1987) (finding that a university lawn was a traditional public forum because there is a "similarity between an open campus lawn and a traditional public forum like municipal parks," and that the university failed to tailor its time, place, and manner restrictions narrowly enough).

124. *See infra* Part II.

125. *See infra* Part II.

126. *See* Grayned v. City of Rockford, 408 U.S. 104, 118 (1972) ("Just as Tinker made clear that school property may not be declared off limits for expressive activity by students, we think it clear that the public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public."); *see also* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1714 (1989).

and policy with respect to the property, and its physical characteristics and location."[127] Whereas all courts recognize traditional public forums, designated public forums, and nonpublic forums, not all courts agree on how to apply the limited public forum doctrine.[128] Because the term suggests that a forum can be both public and nonpublic at the same time, critics argue that it is oxymoronic.[129] Furthermore, it seems as though limited public forums and designated public forums are synonymous; in both situations, a university sets aside some areas on campus for speakers while reserving other areas for private use.[130] Therefore, courts do not treat all universities as a certain type of forum; instead, they examine campus forums on an ad hoc basis.

2. Standards of Scrutiny in the Educational Setting

Traditionally, courts assert strict scrutiny when analyzing content-based restrictions on speech.[131] Under that standard of review, the government must demonstrate that it has a compelling interest in limiting speech, and that it uses the least restrictive means to do so.[132] On the other hand, a content-neutral speech restriction is subject to intermediate scrutiny because there is a lesser risk that the restriction

127. Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams, No. 1:12-CV-155, 2012 WL 2160969, at *3 (S.D. Ohio June 12, 2012).

128. *See supra* Part I*; see also* Steven G. Gey, *Reopening the Public Forum—from Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1555–59, 1569 (1998) (citing Int'l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992)) (writing that even the Supreme Court has been unable to reach a majority opinion regarding whether a forum is limited and noting that, at the time, Justice Kennedy seemed hesitant to accept the limited public forum doctrine).

129. Gey, *supra* note 128, at 1536.

130. Gilles v. Garland, 281 F. App'x 501, 509 (6th Cir. 2008) (stating that "the second type of forum has been alternatively described as a 'limited public forum,' . . . and as a 'designated public forum.'"); Ala. Student Party v. Student Gov't Ass'n of the Univ. of Ala., 867 F.2d 1344, 1350 (11th Cir. 1989) (finding that a government creates a limited public forum when it "intentionally open[s]"—or designates—"a nontraditional forum for public discourse").

131. Boos v. Barry, 485 U.S. 312, 312 (1988) (finding that a "content-based restriction on political speech" could not "withstand exacting scrutiny"); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); *see also* DAVID L. HUDSON, JR., THE FIRST AMENDMENT: FREEDOM OF SPEECH § 2:2 (2012); RICH, *supra* note 33, § 5:4.

132. HUDSON, *supra* note 131. A city ordinance prohibiting a meeting by the local Communist party is presumptively unconstitutional because it "selectively targets" a political group's speech. *Id.*

will discriminate against particular subjects or viewpoints.[133] The government need only demonstrate that it has a substantial interest in limiting the speech and that the restriction is narrowly tailored to achieve that interest.[134] Narrow tailoring requires that a regulation "does not 'burden substantially more speech than is necessary to further the government's legitimate interests.'"[135] The time, place, or manner test falls under this standard.[136]

In the educational realm, courts have applied scrutiny in a similar manner. For instance, university regulations of speech within traditional and designated public forums are treated with strict scrutiny if they are content-based.[137] However, courts have carved out an exception for time, place, or manner restrictions.[138] Such restrictions must be "justified without reference to the content of the regulated speech, . . . narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information."[139] In a nonpublic or limited

133. Gilles v. Miller, 501 F. Supp. 2d 939, 948 (W.D. Ky. 2007) ("In order for the restriction to be valid it must not discriminate against speech on the basis of viewpoint and must be 'reasonable in light of the purpose served by the forum.'" (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985))); RICH, *supra* note 33, § 5:4. Content-neutral speech as a category is somewhat ambiguous, as Justices tend to disagree about a restriction's neutrality. *Id.* § 5:5. There is a third category, known as viewpoint-based discrimination, where universities restrict speech "because of the speaker's specific motivating ideology, opinion, or perspective." Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995). Courts have never upheld such "egregious" restrictions, and thus they are not included in this analysis. *Id.*

134. Ward v. Rock Against Racism, 491 U.S. 781, 787 (1989) (applying intermediate scrutiny to find that a city's noise ordinance was content-neutral and "narrowly tailored to serve significant government interests").

135. Pro-Life Cougars v. Univ. of Hous., 259 F. Supp. 2d 575, 582 (S.D. Tex.), *appeal dismissed*, 67 F. App'x 251 (5th Cir. 2003) (quoting *Ward,* 491 U.S. at 799).

136. HUDSON, *supra* note 131, § 2:2. A city regulation limiting the hours during which the local Communist party can meet is more likely to be constitutional, because it does not regulate which party can speak; rather, it regulates when a party can speak. *Id.*

137. Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams, No. 1:12-CV-155, 2012 WL 2160969, at *3 (S.D. Ohio June 12, 2012) (citing Miller v. City of Cincinnati, 622 F.3d 524, 534–535 (6th Cir. 2010)).

138. *See* Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018) ("In a traditional public forum—parks, streets, sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited . . . The same standards apply in designated public forums."); *see also* Langhauser, *supra* note 7, at 502.

139. *Ward*, 491 U.S. at 791.

public forum, the standard is much lower.[140] The government need only demonstrate that its regulations are content-neutral and reasonable.[141]

On a school campus, content-based discrimination may be difficult to discover.[142] The *Tinker* case focused on a school policy that unconstitutionally restricted speech based on its content.[143] In another instance, a district court found that vesting a University of Houston administrator with "unfettered discretion" to approve or deny student access to a campus speech zone "[had] the potential for becoming a means of suppressing a particular point of view," rendering the regulation content-based regardless of the time, place, or manner test.[144] The court suggested that, if the administrator had explained his decision, or if his decision was subject to review, a lower standard

140. *Minn. Voters All.*, 138 S. Ct. at 1885 ("In a nonpublic forum, on the other hand—a space that 'is not by tradition or designation a forum for public communication'—the government has much more flexibility to craft rules limiting speech."); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001) ("If the forum is a traditional or open public forum, the State's restrictions on speech are subject to stricter scrutiny than are restrictions in a limited public forum.").

141. *Univ. of Cincinnati*, 2012 WL 2160969, at *3 (citing *Miller*, 622 F.3d at 534–535); *see also* Langhauser, *supra* note 7, at 503.

142. HUDSON, *supra* note 131, at § 2:3. "The U.S. Supreme Court has explained that the determining factor is 'whether the government has adopted a regulation of speech because of disagreement with the message it conveys.'" *Id.* (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 295 (1984)). In order to meet speech code requirements, a university may feel compelled to deny certain messages altogether. *See, e.g.*, Mitchell, *supra* note 13, at 822–23 (1992) (writing that universities must balance the psychological effects of hate speech, the educational benefits of promoting civility, and fear of appearing to support hate speech against the "slippery slope toward censorship and ultimately totalitarianism" that could result from speech codes).

143. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969). After learning of students' plans to wear armbands to protest the Vietnam War, the local schools adopted policies prohibiting that form of speech. *Id.*; Davis, *supra* note 10, at 293.

144. Pro-Life Cougars v. Univ. of Hous., 259 F. Supp. 2d 575, 578, 584–85 (S.D. Tex.), *appeal dismissed*, 67 F. App'x 251 (5th Cir. 2003). In this case, a group of students wanted to create a "Justice for All Exhibit" to protest abortion "at any of three suggested grassy areas" on the university's main plaza. *Id.* at 578. A university dean determined that the exhibit "was 'potentially disruptive'" and required the group to relocate to other sites that were "too small" and "too far removed" from campus. *Id.* at 579. The court found that "the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker [sic] rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so." *Id.* at 584. Thus, a policy generally needs to contain some sort of limiting language on an administrator's discretion in order to avoid strict scrutiny; otherwise, the policy may simply become a means to further the administrator's particular viewpoint while denouncing a student's opinion. *Id.*

of scrutiny may have applied.[145] On the other hand, the court struck the policy down simply because it had the potential of becoming content-based; consequently, this case exemplifies how strict scrutiny is a difficult standard to overcome, and may be applied even when a policy is not—but merely could become—content-based.[146]

3. Putting It All Together: Combining Forums and Scrutiny

Currently, courts can take up to eight alternative approaches when it comes to assessing speech zone lawsuits against universities.[147] A court may find: (1) a university is a traditional public forum and its regulation is content-based; (2) a university is a traditional public forum and its regulation is content-neutral; (3) a university is a designated public forum and its regulation is content-based; (4) a university is a designated public forum and its regulation is content-neutral; (5) a university is a nonpublic forum and its regulation is content-based; (6) a university is a nonpublic forum and its regulation is content-neutral; (7) a university is a limited public forum and its regulation is content-based; and (8) a university is a limited public forum and its regulation is content-neutral.[148]

Traditional and designated public forum tests produce similar outcomes. For either forum, if a regulation is content-based, it will be subject to strict scrutiny and presumptively unconstitutional.[149] If the

145. *Pro-Life Cougars*, F. Supp. 2d. at 583–84. The court held that the administrator's arbitrary control violated the First Amendment because his decisions were not subject to review, nor was he required to provide students with explanations for restricting their speech. *Id.* There are two problems posed by the court's open-ended resolution: first, the court failed to address what kind of explanation for a restriction would have been enough to meet First Amendment standards. *Id.* Second, the court did not seem to consider the fact that other administrators would likely review controversial decisions, and they may feel inclined to agree with their colleague. *Id.* This suggests that content-based restrictions could be subject to lesser scrutiny, so long as an administrator explains his decisions or another administrator reviews them. *Id.*

146. *Id.*

147. This list of approaches does not include viewpoint discrimination because there is no room for discretion in viewpoint-based claims; if a court finds that a policy is viewpoint-based, it will automatically find the policy unconstitutional. *See* Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018) ("[R]estrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited.").

148. *See* Langhauser, *supra* note 7, at 501–03; *supra* Part II.

149. *See, e.g.*, Gilles v. Miller, 501 F. Supp. 2d 939, 947 (W.D. Ky. 2007) (citing Perry Educ. Ass'n

regulation is content-neutral, it must meet the time, place, or manner test.[150] Though still considered a form of strict scrutiny, it is relatively easy for a university to demonstrate that its restriction on the time, place, or manner of speech is reasonable and leaves a speaker with ample alternatives for communication.[151] On the other hand, a speech zone in a nonpublic forum only needs to be reasonable, regardless of whether the restriction is content-based or content-neutral.[152] Finally, the results of limited public forum analyses will vary depending on the court hearing the case and the location of the contested zone. Though some courts treat the specific location within a limited public forum as a nonpublic forum, others treat the location like a designated public forum.[153] In other words,

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v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983)); *see also Forums*, LEGAL INFO. INST. https://www.law.cornell.edu/wex/forums [https://perma.cc/GLP6-MT2D] (last visited Oct. 1, 2018); HUDSON, *supra* note 131, § 2:2.

150. HUDSON, *supra* note 131, § 2:2; *see also* Langhauser, *supra* note 7, at 501.

151. *See, e.g.*, Roberts v. Haragan, 346 F. Supp. 2d 853, 862 (N.D. Tex. 2004) ("[A]ny restriction of the content of student speech in [public forums] is subject to the strict scrutiny of the 'compelling state interest' standard, and content-neutral restrictions are permissible only if they are reasonable time, place, and manner regulations that are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication.");
Gilles, 501 F. Supp. 2d at 947 (finding that traditional public forums are subject to strict scrutiny and that "[t]he government may enforce regulations on the time, place, and manner of expression in a traditional public forum if the regulations are content-neutral"); Davis, *supra* note 10, at 270.

152. *Roberts*, 346 F. Supp. 2d at 860 ("[I]n . . . nonpublic forums, the government may restrict the forum for its intended purposes, communicative or otherwise, as long as the regulations impose reasonable content-based restrictions on speech that are not viewpoint-based.") (citing *Perry*, 460 U.S. at 46; Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985)); *Forums*, *supra* note 149.

153. *Gilles*, 501 F. Supp. 2d at 948. In *Gilles*, the district court stated that the "university is as a whole a limited public forum" but found that certain speech areas on campus were designated forums. *Id.* at 947–48. Despite finding that the speech areas were designated forums, the court examined the zones as if they were nonpublic forums. *Id.* at 948–49. The court concluded that the policy was content-neutral and reasonable without examining whether the zones were narrowly tailored to achieve a compelling government interest. *Id.* at 949. In *Bloedorn v. Grube*, the Eleventh Circuit Court of Appeals also treated the university as a limited public forum. Bloedorn v. Grube, 631 F.3d 1218, 1232 (11th Cir. 2011). It conducted a nonpublic forum analysis for sidewalks and rotundas on campus, and it found that speech restrictions in those areas were reasonable. *Id.* at 1234. However, it conducted a separate designated forum analysis for the campus "Free Speech Area" and found that the university had a significant interest to regulate the time, place, and manner of speech in that area. *Id.* at 1234, 1236–38. It also found that the restrictions in the speech zone were narrowly tailored and provided ample alternatives for speech. *Id.* at 1236–38. In a different case, the Eleventh Circuit determined that the level of scrutiny applied to limited public forums depended on the government's intent for the space:

> for those topics or speakers for which the government has made the property

the limited public forum is usually a reiteration of the nonpublic or designated public forum standards. Below, Figures 1.1 and 1.2 depict the typical judicial approaches to forum and scrutiny analysis. Figure 1.1 demonstrates the standards when a restriction is content-based, and Figure 1.2 demonstrates what happens when a restriction is content-neutral.

Figure 1.1

Forum Type	**Regulation Type**	**Level of Scrutiny**	**Test**
Traditional Public	Content-Based	Strict	Compelling Interest + Least Restrictive Means
Designated Public	Content-Based	Strict	Compelling Interest + Least Restrictive Means
Nonpublic	Content-Based	Reasonable	Rational Basis
Limited Public	Content-Based	Strict or Reasonable (Depends on Court)	Strict or Reasonable (Depends on Court)

> available, a limited public forum is treated as a public forum; for all other topics or speakers, it is treated as a nonpublic forum . . . As long as the government maintains the [public] forum . . . it is bound by the same constitutional standards that apply in a traditional public forum context: "a content-based prohibition must be narrowly drawn to effectuate a compelling state interest."

Ala. Student Party v. Student Gov't Ass'n of the Univ. of Ala., 867 F.2d 1344, 1350 (11th Cir. 1989). Finally, in a concurring opinion in *Gilles v. Garland*, a Sixth Circuit Court of Appeals judge discussed a circuit split when it came to limited public forums; the Fourth Circuit applied the reasonableness standard to limited public forums, whereas the Fifth and Eighth Circuits applied strict scrutiny to such places. Gilles v. Garland, 281 F. App'x 501, 514 (6th Cir. 2008) (Moore, J., concurring).

Figure 1.2

Forum Type	**Regulation Type**	**Level of Scrutiny**	**Test**
Traditional Public	Content-Neutral	"Strict"	Time, Place or Manner
Designated Public	Content-Neutral	"Strict"	Time, Place or Manner
Nonpublic	Content-Neutral	Reasonable	Rational Basis
Limited Pubic	Content-Neutral	"Strict" or Reasonable (Depends on Court)	"Strict" or Reasonable (Depends on Court)

B. Problems with Continuing Current Forum and Scrutiny Analyses

1. Too Many Forums to Function

Rather than view the university as a whole when conducting a forum analysis, courts consider it a setting with "a variety of fora" scattered across campus.[154] One area of the school may be a traditional public forum, such as a street or sidewalk, whereas another area may be closed to the public, like a classroom.[155] The forum analysis complicates speech zone litigation against a university because litigants must determine what kind of forum they are

154. *Bloedorn*, 631 F.3d at 1232; Bowman v. White, 444 F.3d 967, 976 (8th Cir. 2006).
155. Smith v. Tarrant Cty. Coll. Dist., 670 F. Supp. 2d 534, 538–39 (N.D. Tex. 2009).

challenging and what level of scrutiny the court should apply, producing diverse arguments and results.[156]

The location in which a speaker stands has become the deciding factor of whether he is afforded constitutional protection; if the speaker cannot successfully argue that the forum is public and that the university lacks a significant interest in regulating the speech, he has very little to no chance of winning his case. For instance, even though an open, grassy area would typically be a traditional or designated public forum, the area's proximity to a classroom may convert it into a nonpublic forum.[157] Additionally, given the different characteristics and levels of scrutiny that may apply on a single campus, litigants can likely only challenge one university speech zone at a time rather than challenging the entire school policy.[158] This may deter litigants from contesting the zones altogether.

Finally, even though state legislatures have attempted to remedy these problems by banning free speech areas on campus, legislation overlooks one major shortcoming: universities may still reasonably regulate the time, place, and manner in which speech occurs.[159] As a result, this type of legislation does not appear to do much more than reiterate longstanding case precedent, and opponents of speech zones will not be able to turn to these laws for support.[160]

2. Universities are Exercising an Expressive Gerrymander Against Speech

Even if universities can justify restricting student speech to certain areas around campus, regulating speech to geographical zones on

156. Herrold, *supra* note 17, at 956–58.

157. *See Roberts*, 346 F. Supp. 2d at 870 n.20 ("Permission for activities near intersections or during certain hours in close proximity to academic buildings might also be justified by a significant [u]niversity interest in assuring safety or an environment conducive to study or teaching.").

158. *See, e.g.*, *Bloedorn*, 631 F.3d at 1232 (challenging only a few specific locations on campus and examining each location under separate forum tests).

159. *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-1865 (2017); COLO. REV. STAT. § 23-5-144 (2017); VA. CODE ANN. § 23.1-900.1 (2017).

160. *Compare* ARIZ. REV. STAT. ANN. § 15-1865 (2017); COLO. REV. STAT. § 23-5-144 (2017); VA. CODE ANN. § 23.1-900.1 (2017), *with* Bayless v. Martine, 430 F.2d 873, 878 (5th Cir. 1970).

campus resembles another form of government zoning: gerrymandering.[161] Justice Kennedy notably departed from the traditional treatment of gerrymandering cases when he stated that such "allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views."[162] In that way, he introduced a First Amendment right to vote free from government-imposed burdens based on voters' "ideolog[ies], beliefs, or political association[s]" as a "subsidiary standard" to Fourteenth Amendment equal protection claims.[163]

Just as legislatures alter voting districts to specify where voters can exercise their constitutional right to vote, universities draw borders on campus maps designating where speakers can exercise their constitutional right to speak.[164] In both situations, neither the speaker nor the voter can reach his intended audience.[165] When

161. *See* Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439, 503 (2006). Zick argues that "spatial tailoring" is a form of "expressive gerrymandering" that prevents speakers from reaching their intended audience. *Id.* The Supreme Court has also encountered various "religious gerrymandering" cases in which plaintiffs argue that a law "gerrymanders" a religious group when it targets its religious practices. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 536–37 (1993) (finding that a city ordinance "punishing '[w]hoever . . . unnecessarily . . . kills any animal'" for a ritual, rather than for food consumption, gerrymandered a religious group who made animal sacrifices, producing a "net result" of discrimination against that particular religion despite being neutral on its face); *see also* Gillette v. United States, 401 U.S. 437, 452 (1971) (stating that "the Establishment Clause forbids subtle departures from neutrality, 'religious gerrymanders,' as well as obvious abuses"); Symposium, *Beyond Separatism: Church and State: Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 155–56 (2002) (noting that a law discriminating against religion or speech should be subject to strict scrutiny "if the regulation constitutes a . . . gerrymander which has the effect of singling out a . . . practice for unfavorable treatment").

162. Vieth v. Jubelirer, 541 U.S. 267, 314 (2004).

163. *Id.* at 314–16.

164. *See* Neal H. Hutchens, *New Legislation May Make Free Speech on Campus Less Free*, CONVERSATION (June 27, 2017, 9:42 PM), http://theconversation.com/new-legislation-may-make-free-speech-on-campus-less-free-77609 [https://perma.cc/WRL4-H83S] ("[I]nstitutions shouldn't seek to restrict students' First Amendment speech rights to strict borders on campus . . . ."); *see also, e.g.*, *Map of Dixie State University with Free Speech Zone*, FIRE (Aug. 1, 2014), https://www.thefire.org/map-dixie-state-university-free-speech-zone/ [https://perma.cc/WRF8-7BQ7].

165. Brief for Colleagues of Professor Norman Dorsen as Amici Curiae Supporting Appellees at 6, Gill v. Whitford, 138 S. Ct. 1916 (2017) (No. 16-1161). In support of their argument opposing gerrymandering, the writers of the brief drew parallels between voting and speaking:

gerrymandering occurs, a voter is unable to sway the election because his vote is rendered ineffective; his vote does not reach the government branch for which it was intended.[166] Likewise, a speaker relegated to an off-campus gazebo fails to reach her intended audience and is, thus, preempted from speaking her message.[167]

Though universities do not necessarily apply speech zone policies in an overtly discriminatory way, they nevertheless divide a campus "into political units . . . to give some group a special advantage."[168] Speech areas carry an inherently political undertone to them; by limiting speech to a certain area on campus, administrators suggest that they value no speech over some speech, regardless of its content.[169] To illustrate this point, a university may deny both the College Democrats and the College Republicans the opportunity to

> When massive political gerrymandering is used systematically, as here, to deprive independents and adherents of both major political parties of a fair opportunity to participate in genuinely contestable elections, it eliminates genuine choice from the electoral process, and drains the First Amendment activities of listening, choosing, supporting and voting of practical effect. It is the First Amendment equivalent of formally permitting a speaker to speak, but denying her an audience.

Id.

166. *See, e.g.*, Whitford v. Gill, 218 F. Supp. 3d 837, 854 (W.D. Wis. 2016) (explaining that gerrymandering techniques such as "'*cracking*'—'dividing a party's supporters among multiple districts so that they fall short of a majority in each one'—and '*packing*'—'concentrating one party's backers in a few districts that they win by overwhelming margins,' [occur] in order to dilute the votes of Democrats statewide"), *vacated*, 138 S. Ct. 1916 (2018).

167. Students Against Apartheid Coal. v. O'Neil, 660 F. Supp. 333, 339 (W.D. Va. 1987). The district court declared that "when a state body provides a citizen with an alternative forum for expression it should open up a forum that is accessible and where the intended audience is expected to pass." *Id.*; *see also* Bay Area Peace Navy v. United States, 914 F.2d 1224, 1229 (9th Cir. 1990) (finding "an alternative is not ample if the speaker is not permitted to reach the 'intended audience'"); Zick, *supra* note 161, at 503.

168. *Gerrymandering*, *supra* note 24.

169. *See* Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content Neutrality*, 16 U. PA. J. CONST. L. 1261, 1305 (2014). Kreimer writes:

> [P]ower devolves often to the hands of potential village tyrants, and doctrine enjoining officials to balance costs and benefits of expression becomes a gateway to repression . . . A doctrine that mandates that officials act without censorial motives [does not fare well], for officials are often blind to their own motivations, adept at rationalization, and eager to avoid offense to majority constituents even when they harbor no malice themselves.

Id.

campaign on the quad for an upcoming presidential election, reasoning that the university does not want potentially controversial expression to occur in such an open, traffic-heavy area.[170] Although this policy would not value one party over the other, it would nevertheless implicitly value nonpolitics over politics, with the assumption that politics are disruptive.[171] The same can be said for a religious group that wishes to speak near a campus's chapel to encourage students to attend a service there. It might be the university's typical practice to prohibit any group from speaking in the area near the chapel. However, this policy not only prevents the religious group from reaching its intended audience but also has an underlying effect of promoting non-religious values over religious ones.[172]

The elevation of noncontroversy over politics, religion, and protests is comparable to the equal protection violations that occur in gerrymandering cases. Just as gerrymandering protects and preserves a select amount of votes while diluting the rest, speech zones protect members of campus from hearing potentially uncomfortable topics while thinly dispersing speakers across campus.[173] As the district court in *Whitford v. Gill* noted:

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170. Bayless v. Martine, 430 F.2d 873, 875 (5th Cir. 1970) (holding that restricting any "interference with the free flow of traffic" was permissible).

171. *See infra* note 213.

172. *See* Roberts v. Haragan, 346 F. Supp. 2d 853, 867 (N.D. Tex. 2004) (citing Horton v. City of Houston, 179 F.3d 188, 193 (5th Cir. 1999)) (finding that "a rule that has a substantial risk of eliminating certain ideas or viewpoints from the public dialogue are content-based").

173. *Compare* Vieth v. Jubelirer, 541 U.S. 267, 354 (2004) (Souter, J., dissenting) (noting that "the harm from partisan gerrymandering is . . . a species of vote dilution: the point of the gerrymander is to capture seats by manipulating district lines to diminish the weight of the other party's votes"), *with* Zick, *supra* note 161, at 485. Zick writes,

> Even in fora traditionally thought to be set aside for expressive activity, zoning and other seemingly neutral manipulations have fundamentally affected our relationship with spaces that might otherwise have become expressive places. Simply stated, the public forum doctrine has produced an expansion of nonexpressive place . . . In today's social and political climate, courts are more inclined to protect the personal space of the "unwilling listener," even in traditionally public places.

Id.

> "[C]itizens" exercise their "inalienable right to full and effective participation in the political process" by voting for their elected representatives. "Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature." Moreover, "the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged."[174]

Although the Supreme Court ultimately remanded the plaintiffs' claims in *Gill*, it was on the ground that not every plaintiff could show how the voting scheme impacted his individual vote.[175] Similarly, a student challenging a speech regulation must demonstrate that the restriction curbed his personal right to speak.[176] Although that may exclude some students' claims, there is less attenuation in the link between a school policy and student speech; a voter would likely have difficulty demonstrating how a broad legislative scheme directly impacts him, whereas a speaker would have much less difficulty demonstrating how a school policy inhibits his speech.[177]

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174. Whitford v. Gill, 218 F. Supp. 3d 837, 865 (W.D. Wis. 2016) (internal citation omitted) (quoting Reynolds v. Sims, 377 U.S. 533, 565 (1964)), *vacated*, 138 S. Ct. 1916 (2018).

175. Gill v. Whitford, 138 S. Ct. 1916, 1921 (2018).

176. *See, e.g.*, *Roberts*, 346 F. Supp. 2d at 864 n.12 ("This Court will not stretch the bounds of the requisite concrete injury that must be shown in order to make an as-applied challenge to include such a case as this where the [p]laintiff never actually shows up to exercise the right to speak he claims is so important."); *see also* Abbott v. Pastides, 263 F. Supp. 3d 565, 580 (D.S.C. 2017) (finding that a university had not and would not apply a sexual harassment policy to students after a controversial event and, as such, the students lacked standing because they failed to demonstrate a "credible threat of enforcement") *aff'd*, 900 F.3d 160 (4th Cir. 2018).

177. *Compare Gill*, 138 S. Ct. at 1921, *with* Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams, No. 1:12-CV-155, 2012 WL 2160969, at *7 (S.D. Ohio June 12, 2012) ("Plaintiffs have established a significant likelihood of success on their claims that the University's location requirements unconstitutionally burden their right to free speech" when the university made students relocate to a free speech zone to seek signatures for a petition).

Students wishing to participate in the speech process must have an opportunity for "full and effective participation," but speech zones present a burden that inhibits speakers from having "an equally effective voice."[178] In that way, the First and Fourteenth Amendments overlap regarding place restrictions on speech, yet litigants often overlook the fact that both amendments are at play.[179] Justice Kennedy's belief that First Amendment matters underlie broader Fourteenth Amendment concerns in gerrymandering is present in the inverse on college campuses; speech zones, though primarily a First Amendment issue, also invoke some Fourteenth Amendment concerns because universities can refuse to give speech a platform altogether by abusing place restrictions.

Of course, a university must frequently balance students' competing interests. Students outside a chapel wish to encourage students to attend a service, whereas students inside the chapel wish to attend their own service without external distractions; similarly, students protesting on a lawn might disrupt students listening to a classroom lecture nearby. A university has a compelling interest in fulfilling its academic mission by balancing students' diverse needs, preferring classroom lectures over other forms of speech, and prioritizing student safety. [180] However, geographical limits are often not narrowly tailored to serve this interest; instead, they significantly burden speakers' choice of audience and deter speech altogether.[181] Rather than restrict the location of speech, universities must focus on restricting the manner of speech—particularly whether the speech

178. *Whitford*, 218 F. Supp. 3d at 865 (quoting Reynolds v. Sims, 377 U.S. 533, 565 (1964)).

179. *See, e.g.*, Gilles v. Miller, 501 F. Supp. 2d 939, 950 (W.D. Ky. 2007) (striking down visiting speaker's argument that he had an equal protection interest in being granted access to certain locations on campus); *see also Roberts*, 346 F. Supp. 2d at 874 (denying a student's equal protection claim against a university speech restriction without providing reasoning).

180. *See Roberts*, 346 F. Supp. 2d at 872–73 (weighing the university's "academic mission"—such as providing "equal access to all the benefits, services, activities, and privileges" offered at the school—against the chilling effects of speech regulations, particularly in public forums).

181. Pro-Life Cougars v. Univ. of Hous., 259 F. Supp. 2d 575, 584 (S.D. Tex. 2003) (finding that "[t]o be narrowly tailored, a speech regulation must not burden substantially more speech than is necessary to further the stated legitimate governmental interest . . . [but authorizing the dean to deny potentially disruptive events] has burdened more speech than necessary to carry out the University's academic mission") *dismissed*, 67 F. App'x 251 (5th Cir. 2003).

produces imminent lawless action—and the permissible time constraints during which speech can occur.

III. Proposal

Perhaps lawyer Thomas J. Davis said it best when he wrote, "Place restrictions on student speech are a terrible idea."[182] He made this assertion in the early 2000s as a law student when a wave of litigation against free speech zones was emerging.[183] Unfortunately, little progress has been made since then; despite students' increased attempts to combat the zones in the courthouse and through the legislature, universities are still able to regulate speech on campus by limiting the places in which it occurs.[184] Although Davis proposed that universities should revise their policies to end place restrictions,[185] few colleges have done so.[186] Therefore, it is up to the courts to refuse to recognize place restrictions on speech, particularly on college campuses. In doing so, courts will create a more streamlined, simplified litigation process while ensuring that university speech policies comply with the First and Fourteenth Amendments. More importantly, it will protect students' constitutional right to freedom of expression as well as the free flow of information and academic inquiry.

A. The Place Analysis in the Context of the First Amendment

Eliminating the place prong of the time, place, and manner test would shift the focus of speech zone litigation away from the location where a speaker chooses to stand.[187] In that way, eliminating a place test would alleviate the burden that courts currently face

182. Davis, *supra* note 10, at 297.
183. *Id.* at 267–68.
184. *See supra* Part II.
185. Davis, *supra* note 10, at 297.
186. Samantha Harris, *'Free Speech Zones,' Then and Now*, FIRE (Dec. 27, 2016), https://www.thefire.org/free-speech-zones-then-and-now/ [https://perma.cc/Z2W7-DHSR].
187. *See, e.g.*, Bayless v. Martine, 430 F.2d 873, 875, 878 (5th Cir. 1970) (determining that proximity to classrooms made an open area a nonpublic forum rather than a traditional public forum).

when it comes to conducting a First Amendment analysis in the educational setting. Courts would no longer need to measure the size of a sidewalk to determine if it was narrowly tailored to serve a compelling government interest.[188] They would no longer need to assess the distance between a free speech area and main campus to decide whether the speaker was too far away from his intended audience.[189] They would no longer need to consider whether and what kinds of alternatives were available to a speaker.[190]

Likewise, just as Justice Kennedy warned that courts should protect a "First Amendment interest of not burdening or penalizing citizens because of their participation" in the voting process, speakers should not be penalized simply because they seek to participate in the speech process on campus.[191] Refusing to uphold place restrictions would eliminate the burden a speaker faces when she tries, but fails, to reach her intended audience because they are geographically far away.[192] A speaker would then have a fair opportunity to actually

188. Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams, No. 1:12-CV-155, 2012 WL 2160969, at *3 (S.D. Ohio June 12, 2012) (writing that "the Free Speech Area is a grassy open space between slant walks measuring approximately 4,537 square feet on the University's West Campus . . . . It comprises approximately .01% of the entire campus").

189. Roberts v. Haragan, 346 F. Supp. 2d 853, 864 (N.D. Tex. 2004) (finding that a school's "request that Plaintiff change the location of his speech by approximately twenty feet was a legitimate, viewpoint-neutral, location consideration that was narrowly tailored to meet a significant University concern").

190. Pro-Life Cougars v. Univ. of Hous., 259 F. Supp. 2d 575, 578–79 (S.D. Tex. 2003) (weighing plaintiffs' concern that alternative locations for their speech were "too small . . . too far removed from the part of campus where students congregate and . . . obscured from view by trees" against administration's assertion that the students' speech was "potentially disruptive") *dismissed*, 67 F. App'x 251 (5th Cir. 2003).

191. Vieth v. Jubelirer, 541 U.S. 267, 314 (2004).

192. Students Against Apartheid Coal. v. O'Neil, 660 F. Supp. 333, 340 (W.D. Va. 1987). Students protesting the University of Virginia's investments in South Africa during the apartheid sought to erect shanties on a campus lawn to illustrate life for black South Africans at the time. *Id.* at 335–37. This location would ensure that members of the university board would see the protestors during their quarterly meetings, but the university created a policy prohibiting "any structure or extended presence" on the lawn. *Id.* at 336–37. The district court held that, although the university had authority to regulate the time, place, and manner of speech, it failed to show how its restrictions on speech were the least restrictive means to promote "esthetic integrity" on campus. *Id.* at 339. Furthermore, the alternative modes of communication available to the student protest would impose "more cost and less autonomy than the shanties, [and were] less likely to reach the Board of Visitors who may not deliberately be seeking information about apartheid." *Id.* at 340. After the university revised its policy to eliminate the phrase "extended presence," the district court found for the university, reasoning that the policy became

convey her message, rather than be gerrymandered to a corner of campus where her expression is rendered silent and, as a result, ineffective.[193]

Most importantly, abolishing the place test would narrow the number of approaches a court must consider when it comes to forum and scrutiny analyses, vastly simplifying the complex jurisprudence that has developed in the past fifty years. Typically, the traditional and designated public forum analyses require that a court ask whether a speech zone was reasonable as to its location, whether there were ample alternatives available for speech, and whether relegating speech to a certain location served a significant state interest.[194] Because forgoing the place test would mean that courts would no longer consider whether the location of a zone is reasonable, courts would also no longer need to ask whether ample alternatives were available to a speaker in lieu of the location in which he wished to speak.[195] Instead, courts would only need to determine whether the zones served a significant government interest.[196] This would effectively remove the complex exceptions to strict scrutiny in the educational field and allow courts to revert back to strict scrutiny in its purest form, where a government entity must show that it has a compelling interest to limit speech and uses the least restrictive means to do so.[197]

Furthermore, because the lower standard of scrutiny traditionally applied to speech zones in nonpublic forums simply asks whether a place restriction on speech is reasonable, the elimination of the place

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a content-neutral restriction that was narrowly tailored to preserve "esthetic integrity." Students Against Apartheid Coal. v. O'Neil, 671 F. Supp. 1105, 1107 (W.D. Va. 1987), *aff'd*, 838 F.2d 735 (4th Cir. 1988).

193. *Students Against Apartheid Coal.*, 660 F. Supp. at 340 (finding that alternative modes of communication, such as sending out letters of protest, "might be less effective for delivering the message that is conveyed by the sight of a shanty in front of the Rotunda").

194. *See, e.g.*, Bloedorn v. Grube, 631 F.3d 1218, 1231 (11th Cir. 2011).

195. *See* Zick, *supra* note 161, at 499 (writing that the problem with the time, place, and manner "lies in interpreting and actually applying" standards such as narrow tailoring and ample alternatives, "and doing so with respect to places").

196. *Bloedorn*, 631 F.3d at 1231.

197. *See supra* Part II.

analysis would mean that courts would no longer consider the reasonableness of a place restriction in any context. Therefore, courts would have to presume that free speech zones are unreasonable, essentially elevating the standard of constitutional review for all zones to that of strict scrutiny, no matter the forum.[198] A university would thus need to overcome the difficult hurdle of showing that a speech zone serves a compelling state interest and that the regulation is narrowly tailored to achieve that interest.[199]

Finally, every forum analysis essentially *is* a place analysis.[200] Currently, for each free speech lawsuit, a court must consider the forum in which a speech zone was located to determine whether the university's speech regulation was constitutional.[201] This interdependence would disappear with the application of strict scrutiny and the removal of place tests. Because the speech zone itself would be presumptively unconstitutional, courts would not need to ask which forum housed the zone. By extension, courts would not need to consider the history of a university—whether campus spaces have traditionally been public or private—to determine whether a certain quad is a traditional, designated, or nonpublic forum.[202] They would likewise not need to conduct a somewhat subjective analysis to determine if the university intentionally designated space for speech or if it was unintentionally done.[203] Removing the place test, and thus the forum analysis, would

198. *See* Langhauser, *supra* note 7, at 501.

199. *See, e.g.*, Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams, No. 1:12-CV-155, 2012 WL 2160969, at *7 (S.D. Ohio June 12, 2012) (finding that a university policy was not narrowly tailored when it "paints with a broad brush to encompass all speech that may be classified as a 'demonstration, picket, or rally'").

200. *See, e.g.*, Langhauser, *supra* note 7, at 496 (describing how a court's definition of a forum depends on its location and context).

201. *Id.* at 497. "Once the precise scope of the forum has been identified, counsel should then determine whether that forum is public or non-public." *Id.*

202. Bowman v. White, 444 F.3d 967, 978 (8th Cir. 2006) (finding that when conducting a forum analysis "[w]e must also examine the traditional use of the property, the objective use and purposes of the space, and the government intent and policy with respect to the property . . . we must acknowledge the presence of any special characteristics regarding the environment in which those areas exist").

203. *Compare id.*, *with* Zick, *supra* note 161, at 449 ("The intent to create a 'designated' public forum must be clearly manifested. The 'objective' indicators of this intent include such things as 'the policy and practice of the government' and the 'nature of the property and its compatibility with expressive

elevate the scrutiny analysis, enabling courts to more closely examine the nature of the restriction as content-based or content-neutral.[204]

Despite this change, universities would still be able to maintain a safe and secure learning environment. First, universities should not be limited in their power to designate areas on campus for various uses other than speech. This may include opening walkways or performing arts centers to the public while reserving classroom space for students.[205] In that way, universities can always maintain a "variety of fora" on their grounds.[206] However, courts should avoid examining the forum in which speech occurs for purposes of First Amendment litigation, as doing so would perpetuate the form of expressive gerrymandering that has taken place on college campuses.[207]

Instead, courts should continue to permit universities to regulate the time and manner of speech to maintain a secure environment, subject to the reasonableness standard traditionally used to evaluate such measures. For instance, a university should not prohibit speech from occurring inside of a classroom. Rather, it may still reasonably

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activity.'").

204. *See supra* Part II.

205. *See* Langhauser, *supra* note 7, at 497, 505.

206. Bloedorn v. Grube, 631 F.3d 1218, 1232 (11th Cir. 2011).

207. After removing the place exception, courts will still apply strict scrutiny, allowing universities to demonstrate how it would serve a compelling government interest to reserve certain spaces for certain speakers. For instance, barring strangers from attending class serves an academic value at the very essence of the university's mission—teaching enrolled students—and it serves a compelling interest in security. An alternative option that universities may be able to exercise would be trespass laws; universities may deter members of the public from taking advantage of areas reserved for students. *See* Gilles v. Blanchard, 477 F.3d 466, 469–70 (7th Cir. 2007). In *Gilles v. Blanchard*, Judge Posner wrote of a preacher wishing to access a university lawn:

Public property is property, and the law of trespass protects public property, as it protects private property, from uninvited guests.

> . . . [A] university that decided to permit its open spaces to be used by some outsiders could not exclude others just because it disapproved of their message. But it could use neutral criteria for access, such as that an outsider must be invited to speak on campus by a faculty member or a student group. The difference between invited and uninvited visitors is fundamental to a system of property rights.

Id. at 470 (internal citations omitted).

prohibit methods of speech that are disruptive during class.[208] Similarly, a university should not prevent protests from happening on its front lawn. Instead, a university could forbid any speech on campus that incites others to violence.[209] Finally, a university should not forbid students from engaging in expression in dormitories. Instead, a university could refuse to allow disruptive speech to occur between the hours of 11 p.m. and 7 a.m.[210] These examples demonstrate how a university may still restrict the time and manner of speech to lessen its potentially dangerous effects without refusing a platform to speakers altogether by dispersing forums across campus.

Time and manner restrictions on speech seem to be more discernibly content-based or content-neutral.[211] A school's attempts to restrict the content of speech through time and manner regulations will likely be more obvious to a court. For instance, a university would probably not prohibit speech from occurring between the hours of 9 a.m. and 5 p.m. because those are normal business and class hours; any attempts to prohibit a specific group from speaking during that time would be presumptively unconstitutional because it suggests that the university wants that particular group out of sight until after hours.[212] When it comes to the manner of speech, a blanket prohibition on protests would likely be too broad, as a protest can take many forms including silent sit-ins, wearing black armbands,

208. *See* Langhauser, *supra* note 7, at 497.

209. *See* RICH, *supra* note 6, at § 5.1 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)).

210. Fox v. Bd. of Trs. of State Univ. of N. Y., 841 F.2d 1207, 1211 (2d Cir. 1988) (finding that students have a "right to receive information" in their dormitories).

211. *See Bloedorn*, 631 F.3d at 1237 (finding a university policy reasonable as to its time restriction without conducting a forum analysis because it was a university's "undisputed practice to issue a permit for a speaker's requested date and time so long as the space [had] not already been reserved by another speaker or group."); *see also* Roberts v. Haragan, 346 F. Supp. 2d 853, 857 (N.D. Tex. 2004) (finding that a university's restriction "did not deny [p]laintiff permission to speak at the time or in the manner he chose, but only in the location he had requested").

212. *See, e.g.*, Students Against Apartheid Coal. v. O'Neil, 660 F. Supp. 333, 337 (W.D. Va. 1987). Students intended to erect shanties in a way that would be visible to the school board "from the time their quarterly meetings [were] scheduled to begin until the time of their final adjournment." *Id.* The court found that the university's policy prohibiting students from building shanties on the quad unreasonably restricted the time, place, and manner of speech. *Id.* at 336, 340.

and even quietly distributing pocket Constitutions on a public sidewalk.[213] The overbreadth of a ban against all protests would demonstrate more clearly that a university views protest itself to be too controversial. A court would likely find this unconstitutional given that protest is traditionally protected so long as speakers do not incite listeners to violence.[214] More obviously, a ban on all political speech on campus would certainly be unconstitutional, as that would be a restriction based on the nature and content of the speech.[215] Thus, courts can more clearly observe and strike down time and manner restrictions that inhibit speech based on its content in a way that has not been so clear when it comes to place restrictions.

B. The Place Analysis in the Context of the Fourteenth Amendment

If courts eliminate a place analysis and begin treating speech zones as presumptively unconstitutional, more students will be able to access and participate in discourse on campus. This is important because open dialogue allows parties to engage in free inquiry in accordance with every university's academic mission.[216] Although schools typically do not regulate speech based on a speaker's

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213. HUDSON, *supra* note 131, § 2:2. Hudson writes:

> A content-neutral law could prohibit even more speech than a content-based law. If a city passes a law that prohibits all billboards or signs within its jurisdiction, that law prohibits more speech than a law that selectively prohibits political billboards . . . the fear is that the government might distort the marketplace and favor certain ideas over others. The Supreme Court still looks very closely at any law that prohibits an entire medium of communication.

Id.

214. RICH, *supra* note 33, § 5:1.

215. *See, e.g.*, *id.* § 5:5. When referring to a recent Supreme Court case regarding a content-based regulation on speech, Rich notes:

> All nine justices agreed that a city sign regulation that regulated 23 categories of signs, distinguishing, for example among 'temporary directional signs,' 'political signs,' and 'ideological signs,' was content based and could not survive strict scrutiny. The fact that the restriction did not distinguish within categories based upon the viewpoint of speakers did not result in a lower level of scrutiny.

Id.

216. *See* Coll. Republicans at S.F. State Univ. v. Reed, 523 F. Supp. 2d 1005, 1016 (N.D. Cal. 2007) (quoting Doe v. Univ. of Mich., 721 F. Supp. 852, 863 (E.D. Mich. 1989) (citing Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967))).

viewpoint, they often cast out speakers based on the nature of their speech, particularly if it may be controversial.[217] This presents a Fourteenth Amendment issue, as universities have implicitly treated silence more favorably than potentially contentious speech.[218] Eliminating the place prong of the time, place, or manner test will not necessarily solve this problem immediately, but it is a step in the direction away from the content-based restrictions that often go unnoticed in the form of speech zones.[219]

Finally, just as a dilution of votes creates an equal protection concern by favoring a group of voters on the basis of their ideology while isolating other voters, the division of campus by favoring certain viewpoints while silencing others will necessarily come to an end if courts treat place restrictions as presumptively unconstitutional.[220] Speech zones have diluted and dispersed speakers too thinly across campus, often so that universities can protect certain students from being offended.[221] Elevating silence over speech for the sake of political correctness, as well as burdening speakers so that their messages go unheard, violates both the Equal Protection Clause and the Free Speech Clause.[222] Although free speech zones have these effects, many courts still recognize the zones as reasonable restrictions on speech. Courts must cease granting the zones legitimacy, and instead should begin treating place restrictions as presumptively unconstitutional.

217. *See* Pro-Life Cougars v. Univ. of Houston, 259 F. Supp. 2d 575, 585 (S.D. Tex. 2003), dismissed, 67 F. App'x 251 (5th Cir. 2003); *see also* Roberts v. Haragan, 346 F. Supp. 2d 853, 872 (N.D. Tex. 2004).

218. *See supra* Part II.

219. Herrold, *supra* note 17, at 953–54.

220. *See* HUDSON, *supra* note 131, § 2:2.

221. *Id.*

222. *See supra* Part II.

CONCLUSION

For fifty years, universities have gerrymandered speech to corners, sidewalks, and gazebos in the name of student safety.[223] However, it seems as though colleges have conflated physical safety with emotional safety, attempting to shield students from potentially offensive or controversial speech.[224] Though civility is admirable, it is not always constitutional; the implementation of free speech zones in the name of political correctness violates students' First and Fourteenth Amendment interests in participating in the speech process. Yet, when students contest the speech zones in court, the outcomes vary according to each court's assessment of the forum in which the speech took place.[225] In that way, freedom of speech has become too dependent on the location in which it occurs, preventing courts from striking down regulations that are largely discriminatory. Courts must revert to traditional standards of scrutiny by refusing to accept place restrictions on speech. In doing so, the burden on speakers and courts alike will be lifted, as students will no longer feel deterred from speaking and courts will no longer need to weigh the complex factors involved in current forum analyses.

223. *Supra* Part I.
224. *Supra* Part I.
225. *Supra* Part II.